92-1621

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

A. JOYCE PAYNE

*PETITIONER,*

vs.

UNITED STATES OF AMERICA,

*RESPONDENT.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in finding that the Panama Canal Commission is a United States Agency for purposes of determining that wages paid to its employees were not excludable from taxable income as foreign earned income under 26 USC §911 (1988)?

2. Whether the court of appeals' determination that the Panama Canal Commission is a United States Agency violates Articles II and IV of the United States Constitution and is thus unconstitutional?

3. Whether, in relying on the Panama Canal Treaty to determine if the Panama Canal Commission is a United States Agency for purposes of 26 USC §911 the

Court of Appeals relied on a document that violates Article II of the United States Constitution?

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A. JOYCE PAYNE,

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RESPONDENT.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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The petitioner, A. Joyce Payne, respectfully prays for a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit that

was entered in this proceeding on November 25, 1992.[1]

## OPINIONS BELOW

The District Court for the District of Vermont granted a Rule 56 Summary Judgment in favor of the United States on November 25, 1991, is reported at 778 F.Supp. 804 D. Vt. 1991, and is reproduced at Appendix A. The opinion of the United States Court of Appeals for the Second Circuit, affirming the granting of summary judgment is unreported and is reproduced at Appendix A.

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[1]An Order granting Petitioner's Motion for Enlargement of Time to File Petition for Writ of Certiorari was entered by the Honorable Associate Justice Thomas on the 22nd day of February, 1993.

## JURISDICTION

The judgment of the United States Court of Appeals was entered on November 25, 1992. This petition is filed within the time granted to petitioner by Justice Thomas on February 22, 1993. This Court's jurisdiction is invoked pursuant to 28 USC §1254(1). Jurisdiction in the District Court was invoked pursuant to 28 USC §1346(a)(1), 26 USC §7402 and 26 USC §§ 134, 1345 and 1346(c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Articles II and VI of the United States Constitution, 26 USC §911, and Panama Canal Treaty of 1977 which is reproduced at Appendix C.

## STATEMENT OF THE CASE

This case involves a dispute over

whether the Panama Canal Commission, an entity created by the Panama Canal Treaty of 1977, was properly designated a United States Agency for purposes of 26 USC §911, the Tax Code section referring to foreign earned income. The petitioner challenges such a designation based on a tax assessment against her. The petitioner also claims that since that entity was designated a United States Agency, its composition violates Article VI of the United States Constitution. Additionally, the petitioner asserts that the Panama Canal Commission is created by an unconstitutional document, the Panama Canal Treaty, and the lower courts' reliance on that document was improper. Due to the

financial ramifications of improperly designating the Panama Canal Commission and in turn the Constitutional implications of such a designation, the Court must clarify the issues left unresolved by the decisions below.

**PROCEDURAL BACKGROUND**

The petitioner brought this case in the District Court against the United States claiming that certain wages paid to her deceased husband constituted foreign earned income. The Government counterclaimed to recover delinquent taxes, interest and penalties. In addressing the substantive issue of whether compensation paid by the Panama Canal Commission to its United States citizen employees who live and work in Panama

is taxable, the District Court for the District of Vermont granted summary judgment to the Government.

The District Court found for the Government on two grounds: first, that an ostensible tax exemption contained in Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty of 1977 did not apply to the petitioner based on O'Connor, et ux v. United States, 479 U.S. 27 (1988). Second, regarding the 26 USC §911 issue now before the Court, they found, sua sponte, without the development of a record, that the Panama Canal Commission is a United States Agency.

**REASONS FOR GRANTING THE WRIT**

## I. THE PANAMA CANAL TREATY IS NOT AN AGENCY OF THE UNITED STATES FOR PURPOSES OF 26 USC §911.

Although the Panama Canal Treaty (hereinafter "Treaty") and the Panama Canal Act of 1979 (hereinafter "The Implementation Agreement") both describe the Commission as an "agency" of the United States, as Claims Court Chief Judge Kozinski said in Coplin v. United States, 6 Cl. Court 115 (1984), "its structure and operation differ in fundamental respects from the typical U.S. government agency." Judge Kozinski also described how, in several significant ways, the commission is entirely different from any other United States agency.[2] Viewed in this

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[2]Among the significant differences are the presence of foreign nationals on the governing body and in chief

light, these statements and the fact that self proclamation of agency status does not necessarily grant such status, a close examination of the Panama Canal Commission's (hereinafter "Commission") functions, duties and operations is necessary to establish whether it is an agency for purposes of 26 USC §911.

Cases deciding whether a particular government entity is an agency for the purposes of 26 USC §911 do not create a bright line test. The

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administrative positions of the Commission, the ownership of the land and the facility by a foreign sovereign, the obligation phasing out of United States management of the canal, and the disparate and inferior treatment of United States citizen employees of the Commission.

more carefully reasoned cases[3], do outline, however, broad principles, the basis of which many courts seem to agree are controlling on the issue. In rendering its decision the Appellate Court approved of and relied on these principles.

The framework for determining agency status, for purposes of 26 USC §911, requires assessment of the degree of control the United States exercises over the entity. The degree of control is determined by four underlying factors. These four factors are:

1. The power to initiate and terminate;

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[3]See: Morse v. United States, 443 F.2d 1185 (Ct. Cl. 1971); Kalinski v. Commissioner, 528 F.2d 969 (1st Cir. 1976); and McComish v. Commissioner, 580 F.2d 1323 (9th Cir. 1978).

2. The effectuation of government purposes over those of the entity's organizers and members;

3. The exclusion of private profit; and

4. The limitation of membership to government connected persons.

**A. Power To Initiate and Terminate**

The United States did not, and could not, initiate or create the Panama Canal Commission and it has no power to terminate it. The Commission is authorized by the 1977 Treaty, where it finds its genesis in Article II §3. The Treaty is a joint undertaking between the United States and the Republic of Panama. There would be no treaty and no Commission in the absence of the actions of the Republic of

Panama. Having agreed to the creation of the Commission in the Treaty, the United States is wholly without power to unilaterally terminate the Commission. The Commission automatically terminates by the Treaty's terms on September 30, 1999, and only with the concurrence of both signatory parties could the Commission be terminated at an earlier date.

Although the Second Circuit felt it inappropriate to interpret this factor narrowly, a narrow construction and literal interpretation of those terms is proper, necessary and mandatory.

The terms "initiate" and "terminate" are terms of analysis or art employed to determine the degree of

"control" the United States government exercises over the Panama Canal Commission. The proper inquiry to determine whether or not the Commission passes this factor of control is whether or not the United States government unilaterally "initiated" and whether it can unilaterally "terminate" its existence.

The response to this inquiry is in the negative for both parts. The Commission was a creature of the Treaty between the United States and Panama, with an automatic termination date in 1999 which can not be changed without the affirmative agreement of both parties.

Wherefore, the Commission fails the first of four factors to determine

if the United States government has control over it.

**B. The effectuation of government purposes over those of its organizers and members.**

The Panama Canal Commission, both under the Treaty and as a practical matter, is a transitional entity created jointly by the United States and Panama to provide for the smooth transfer of management and operation of the Panama Canal from the United States to the Republic of Panama.

Under the Treaty, the United States assumed the duty to participate with Panama to effect this transfer of management power. Ownership of the canal passed to the Republic of Panama when the Treaty became effective and the Canal Zone created by the Isthmian

Canal Convention of 1903 disappeared. As such, the purposes of the Republic of Panama, are at least equal to, if not paramount to, the purposes of the United States.

The United States, in actuality, is acting as managing agent in Panama of Panama's canal, and a trainer of Panamanian nationals so that Panama can run it without United States assistance on January 1, 2000. Accordingly, United States government purposes are not "paramount" over those of its organizers and members of the Commission.

The Second Circuit in disagreement stated that "the plain language of the Treaty is convincing," and went on to quote Treaty language that averred

"[T]he United States of America shall...carry out its responsibilities [under the Treaty] by means of a United States Government agency called the Panama Canal Commission..." The Court also determined that the Commission was established to effectuate the government's responsibilities and duties under the Treaty.

The inquiry for the control factor is whether the Commission was established to effectuate government purposes. Even if it is true that the Commission was established to carry out the United States' responsibilities under the Treaty, the inquiry must naturally become whether United States responsibilities under the Treaty were established to effectuate government

Section 911(b)(1)(B)(ii), this rule of strict construction means we must interpret the word"agency" broadly. Groves v. United States, 533 F.2d 1376, 1383 (5th Cir. 1976), cert. denied, 429 U.S. 1000, 97 S.Ct. 529, 50 L.Ed.2d 611 (1976).

Most courts faced with the issue of whether an agency's wages are exempt from federal income taxation have looked to the degree of control the government exercises over the entity. See Kalinski v. Commissioner, 528 F.2d 969 (1st Cir. 1976). The power to initiate and to terminate, the effectuation of government purposes paramount over those of organizers and members, the exclusion of private profit, and the limitation of

membership to government connected persons all serve to identify an agency. Id. at 973 (quoting Morse v. United States, 443 F.2d 1184, 1188, 195 Ct.Cl. 1 (1971), cert. denied, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 45 (1972)).

The United States has almost complete control over the activities of the PCC. The PCC is supervised by a board composed of nine members, a majority of which must be United States nationals. 22 U.S.C. §3612(a). The President of the United States has the power to appoint members of the PCC's board and in addition, the power to remove them, regardless of their nationality. 22 U.S.C. §3612(b). A quorum for the transaction of PCC

business consists of a majority of board members of which a majority of those present are United States nationals. Members of the board who are United States nationals are required to cast their votes in the manner directed by the Secretary of Defense. 22 U.S.C. §3612(a). Thus, the Secretary of Defense controls the outcome of any vote of the board, indicating the PCC is an agency of the United States.

The PCC meets another element of the control test if it effectuates government purposes as opposed to those of its organizers and members.[4] The

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[4]Some courts emphasize this factor to determine whether an entity is an agency of the United States. See Groves v. United States, 533 F.2d at 1383-84.

PCC is not a commercial venture; the operation of the Canal is a governmental exercise of the power of Congress to regulate commerce, rather than a proprietary or business activity of the government. McGehee v.Panma Canal Commission, 872 F.2d 1213, 1218 (5th Cir. 1989) (citing Rogers v. Graves, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937).

The signing of the Panama Canal Treaty of 1977 and the replacement of the Panama Canal Company with the Panama Canal Commission served to further emphasize the governmental nature of the Canal's operation as opposed to its commercial aspects.[5]

[5]Payne argues that the fact the 1977 Treaty transferred sovereignty over the Canal Zone to the Republic of

While the Treaty and accompanying legislation vested the PCC with the power to perform a range of duties in the exercise of the rights of the United States with respect to management, operation, and maintenance of the Canal, they stripped the PCC of the power to perform many of the commercial activities previously

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Panama with the result that the PCC now opeates within an area outside United States sovereignty indicates the PCC is not a United States agency. However, we believe it is the function of the entity in question, not the area in which it operates, that lies at the heart of the inquiry into whether it is a United States agency. Cf. Groves, 533 F.2d at 1284 (in reference to the Government of the Trust Territory of the Pacific Islands, an entity is an agency if its duties encompass fucntions which fall within the repsonsiblity of the United States, whether that responsiblity and its correlative power derive from sovereignty or from a truteeship agreement).

performed by the Panama Canal Company. The Treaty spun these collateral revenue producing businesses off to the Republic of Panama, leaving the operation of the Canal as the sole remaining mission of the PCC. Id. at 1218 (citing Hearings on HR 111 before Subcomm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 96-1 (1979) (Statement of Rep. Murphy). Thus, an analysis of the PCC under the governmental function test indicates it is an agency of the United States.

The PCC meets another element of the control test if it generates only governmental revenue as opposed to private profits. The PCC is required to deposit all its receipts in the Panama Canal Revolving Fund and cannot

spend any of this money unless specifically authorzed by law. 22 U.S.C. §3712(c)(1). The Revolving Fund is part of the United States Treasury and its assets are available to carry out the purposes, functions, and powers of the PCC. 22 U.S.C. §3712(a)(1). There are no provisions for private profit, and accordingly, the PCC meets this aspect of the control test.[6]

The final element of the contol test is whether PCC membership is limited to government connected

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[6]Payne argues that the fact the PCC is permitted to operate at a profit suggests the body is not a federal agency. We believe it is not the capacity to produce revenues in excess of expenditures, but rather,the inurement of profit to private interests, that is the strongest indicator an entity is not a federal agency. See Kalinski, 528 F.2d at 973 n. 13.

persons. All PCC employees are subject to the same duties and responsibilities as federal employees and must conform to a code of conduct that by statute incorporates restrictions substantially equivalent to provisions of law applicable to federal employees. 22 U.S.C. §3622(a); 22 U.S.C. §3622(b).[7] The head of any federal agency may enter into an agreement by which employees of that agency may serve a tour with the PCC and later return to their original employer without loss of pay, seniority, or other rights and benefits. 22 U.S.C.§3643(a). An employee who is denied reemployment

[7]The existing provisions include provisions relating to bribery, graft, and conflicts of interest, and the Ethics in Government Act. 22 U.S.C. §3622(b).

with his agency after service with the PCC can appeal to the Merit Systems Protection Board, even if he or she does not enjoy a veteran's preference. Noble v. Tennessee Valley Authority, 892 F.2d 1013, 1016 (Fed. Cir. 1989) (citing 5 C.F.R. 352.909), cert. denied, ____ U.S. ____, 110 S.Ct. 3214, 110 L.Ed.2d 622 (1990). The Federal Labor Relations Authority handles disputes arising between the PCC and its employee unions.[8] Panama Canal Com. v. Federal Labor Relations Authority, 867 F.2d 905 (5th Cir.

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[8]The purpose of the Federal Labor Relations Authority is to prescribe certain rights and obligations of the employees of the federal government and to establish procedures which are designed to meet the special requirements and needs of the government. 5 U.S.C. §7101(b).

1989). There are many other protections and restrictions applicable to PCC employees that are also distinctly similar to those accorded by the United States to its employees. However, we have already listed an adequate sample to show PCC employment is sufficiently connected to the government to satisfy this element of the control test.

The PCC is controlled by the United States government, operates to serve governmental purposes, does not benefit private interests, and is limited to government connected persons. Therefore, the essential characteristics of the PCC identify it as an agency of the United States, making the wages it pays subject to

federal income taxation.[9]

An analysis of the policies underlying Section 911 also indicates it is an agency for the purposes of the section. The section is designed to encourage citizens of the United States to go abroad to share technical skills. To place these venturesome citizens on an equal footing with citizens and other foreign nationals residing in the host country, who often are not taxed by their own nation, Congress eliminated the possibility of their being taxed by both the United States and the host country by allowing them to exclude their foreign earned income

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[9]Nothing in the cases suggest each and every element of the four part test must be met in order to attain agency status. Even if this were the case, the PCC satisfies each of them.

from their gross income for purposes of computing federal income tax. Congress added the exception for amounts paid by the United States government or an agency thereof to prevent a windfall to United States government employees in foreign countries. Since treaty provisions usually exclude United States government employees from paying income tax to their host country, excluding them from paying federal income taxes on their foreign earned wages was not necessary or desirable. See Smith v. Commissioner, 701 F.2d 807 (9th Cir. 1983) (citing McComish v. Commissioner, 580 F.2d 1323 (9th Cir. 1978.)). In O'Connor, 479 U.S. 27, 107 S.Ct. 347, the Supreme Court held that the Treaty of 1977 exempted from

Panamanian taxation wages earned by United States citizens employed by the PCC. Thus, subjecting Payne's PCC wages to federal income taxation does not levy a second tax upon them and granting Payne an exemption from federal taxation under Section 911 would free her from paying any income taxes and result in a windfall to her.

The cases cited by Payne do not persuade us the PCC is something other than an agency of the United States nor do they convince us it is necessary to take further evidence to make a decision in this matter. Krichbaum v. United States, 138 F.Supp. 515 (E.D. Tenn. 1956) held that where an agency of the United States merely serves as a conduit for funds paid to the worker

by a foreign nation, the employee's wages are exempt. This view has been expressly disregarded by appellate opinions such as Commissioner v. Wolfe, 361 F.2d 62 (D.C. Cir. 1966), cert. denied, Wolfe v. Commissioner, 385 U.S. 838, 87 S.Ct. 86, 17 L.Ed.2d 72 (1966), that look to the nature of the relationship between the entity and the worker, rather than to the source of the funds ultimately paid to the worker, in determining whether wages are exempt.[10] We favor the Wolfe view

[10]The court in Wolfe looked to factors such as who supervised the employee, who had the power to hire and fire the employee, and who were the actual parties to the employment contract, rather than to the source of funds paid to the employee. Were we to examine these factors here, it is clear the PCC an Payne had a traditional employer- employee relationship. There is no argument to support Payne's view

and therefore, the Commission cannot be designated as a United States Agency for any purpose.

## III. IN RELYING ON THE PANAMA CANAL TREATY TO DETERMINE IF THE PANAMA CANAL COMMISSION IS A UNITED STATES AGENCY FOR PURPOSES OF 26 USC §911, THE COURT OF APPEALS RELIED ON A DOCUMENT THAT VIOLATES THE UNITED STATES CONSTITUTION.

### A. The Treaty violates Article II of the United States Constitution.

Article III, Section 3, of the Panama Canal Treaty (Treaty) provides in part: "[T]he United States shall...carry out its responsibilities by means of a United States Government agency called the Panama Canal Commission...." Subsection (a) states that "The Commission shall be supervised by a Board composed of nine members...four of whom shall be

Panamanian nationals." Art. III, Sec. 3(a). This provision of the Treaty violates Article II of the United States Constitution[10] in that it delegates to Panama appointment and removal powers that are, notwithstanding Constitutional and judicial exceptions that are not applicable here, reserved for the President of the United States.

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[10]Art.II, sec.2, cl.2, of the constitution reads:
"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or the Heads of Departments." (Emphasis added)

**1. Commission Members are "Officers" of the United States for Article II purposes.**

The Appointments Clause[11], addresses the power to appoint of "Officers of the United States." Thus, an initial inquiry regarding the constitutionality of the Commission Board provisions of the Treaty under Article II is whether the Panamanian Board members are "officers of the United States" for purposes of the appointments Clause. As will be seen, the case law dictates an affirmative answer to that inquiry.

The Court, in United States v. Germaine, 99 U.S. 508, 509 (1879), stated:

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[11]United States Constitution, Article II, §2, Clause 2.

> "The Constitution for purposes of appointment very clearly divides all its officers into two classes.... That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

The definitive statement pertaining to "Officers" was made by the Court in Buckley v. Valeo, 424 U.S.1 (1976). In Buckley, the Court held, "[T]he fair import [of Germaine] is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'." Buckley, 424 U.S. at 126. The Court proceeded to find that members of the Federal Election Commission were "at

the very least" inferior Officers within the meaning of the Appointments Clause. The Court then defined employees as lesser functionaries subordinate to "Officers of the United States".

Three additional decisions of this Court draw a line between employees and officers. Ex Parte Hennen, 38 U.S. 225, 13 Pet. 230 (1839) which held a clerk of a district court to be an inferior officer. Similarly, in Myers v. United States, 272 U.S. 52 (1926), a postmaster was held to be an inferior officer. Most recently, a special trial judge for the Tax Court was held to be an inferior officer in Freytag v. C.I.R., ___ U.S. ____, 111 S.Ct. 2631 (1991). In Freytag, the Court stated

that the degree of authority exercised by the special trial judges was so significant that it was inconsistent with the classifications of lesser functionaries or employees. There is no bright line test to determine whether an individual is an employee or an officer; Courts must look to the duties and responsibilities of the office in question in making its determination.

Examined in this light, it is nearly indisputable that members of the Board fall into one of the two categories of "Officers of the United States." The Board is responsible for administering not only the Treaty but

the Panama Canal Act (1979)[12] and all amendments thereof as well. The degree of authority exercised by the Board cannot be construed as less significant than that of a postmaster or a special judge for the Tax Court.

**2. The methodology for appointing Commission officers is constitutionally flawed.**

The Appointments Clause, dictates that "[The President] shall nominate, and ...appoint... all other officers of the United States ...but the Congress may by law vest the Appointment... in the President alone, in the Courts of Law, or in the Heads of Departments." This clause serves to prevent the

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[12]The Panama Canal Act is the enabling legislation enacted by Congress to further delineate the rights and duties of the United States and Panama.

diffusion of the appointment power. The Constitution has bestowed on the President the right and duty of appointing the "Officers" which will execute the laws of the United States.

The Court has been ever vigilant in ensuring compliance with the Appointments Clause. In Buckley v. Valeo, supra, the Court invalidated the portions of the Federal Election Campaign Act which provided for the appointment of Commissioners to the Federal Election Commission. The six voting members of the Commission were to be selected as follows: two by the President, subject to confirmation in both the Senate and the House, two by the President pro tempore of the senate, and two by the Speaker of the

House. The Court found this impermissible as violative of the Appointments Clause.

The Panama Canal Treaty provides: "The Commission shall be supervised by a board composed of nine members...four of whom shall be Panamanian nationals proposed by the Republic of Panama for appointment to such positions by the United States in a timely manner." Art.III, Sec. 3(a). In substance, the Treaty reposes in the Republic of Panama the power to appoint "Officers of the United States." In so doing, the President has abdicated his duty to faithfully execute the laws of the Untied States to Panama.

Although the Court has maintained that the Appointments Clause gave

Congress "significant discretion" to determine where it was proper to vest the appointment of inferior officers, Morrison v. Olson, 487, U.S. 654 (1988), the court was referring to appointment by a "Court of Law". It is unfathomable that the Morrison Court contemplated the Republic of Panama as a proper repository for the power to appoint "Officers of the Untied States.

**3. Removal Violations**

The President's power to remove executive officers is considered to be a tool necessary for him to execute the laws of the United States. Myers v. U.S., 272 U.S. 52, (1926). The President's power to remove is by no means absolute. However, several variables enter into the equation when

a court seeks to determine whether Congress has interfered with the President's exercise of executive power.

The Court recently provided a test for determining whether there is a violation of the removal clause in Morrison v. Olson, 487 U.S. 654 (1988), where the validity of the independent counsel (hereinafter "IC") was at issue. The Ethics in Government Act provided that the IC could be removed only for 'good cause'. All parties involved assumed, arguendo, that the IC was a purely executive officer, nevertheless, the Court refused to strictly follow Myers. The Court restated the appropriate test as follows: "[T]he real question is

whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." Morrison, 487 U.S. at 691.

This broad test was further explained in Morrison, but was analyzed with a perspective that focussed on separation of powers issues. The court observed that the good cause limitation merely reduced the President's power, it did not in itself enlarge the power of the other branches.

Nonetheless, the Panama Canal Treaty mandates a removal procedure for officers of the Commission that creates restrictions that "impede the President's ability to perform his constitutional duty," as contemplated

by the court in Morrison. The Panama Canal Treaty provides in Article III, Section 3(b):

> Should the Republic of Panama request the United States to remove a Panamanian national from membership on the Board, the United States shall agree to such request.... In case of removal of a Panamanian member of the Board at the initiative of the United States, both Parties will consult in advance in order to reach agreement concerning such removal.

Although the Court permitted the 'good cause' restriction in Morrison, the present case is readily distinguished. The removal limitation in Morrison did not tend to enhance the power of either of the other two branches, but purportedly only marginally reduced the President's own authority. Clearly, the treaty does

not enhance congressional power either. Instead, as with Panama's authority to "propose" members of the board, the provision requiring consultation before removal smacks of unconstitutional delegation, as does Panama's right to unilaterally remove Panamanian members.

**B. The treaty ratification process was unconstitutional**

The United States Constitution provides: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur..."[13] Historically, the Framers intended the President to negotiate with foreign states, upon advice of the Senate

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[13]United States Constitution, Article II, Section 3 Clause 3.

before negotiation, with continuing Senate advice during the process of negotiation, and, in the end, the President making the treaty to which the Senate had consented. See Louis Henkin, Treaties in a Constitutional Democracy, 10 Mich. J. Intl. L. 406 (1989).

President Carter negotiated with Panama and signed two Treaties in September, 1977. The Senate debated the Treaties in the winter and early spring of 1978. Consent to the Treaties was granted subject to a number of conditions, reservations, and amendments. The major concern of the Senate was insuring American rights with respect to open and free access to the canal. This meant insuring the

right to intervene militarily. This concern was addressed in Condition (1) to the Neutrality Treaty; nominally, the DeConcini Reservation:

> Notwithstanding the provisions of Article V or any other provision of the treaty, if the Canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each <u>independently</u> have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.

[Emphasis added].

Panama expressly agreed to this Condition in its Instruments of

Ratification.[14] However, Panama also included in its ratification instruments three paragraphs which did not appear in the American instrument consented to by the Senate. The second paragraph of the three is the center of dispute. It reads:

> It is also the understanding of the Republic of Panama that the actions which either Party may take in the exercise of its rights and the fulfillment of its duties in accordance with the aforesaid Neutrality Treaty, including measures to reopen the Canal or to restore its normal operation, if it should be interrupted or obstructed, will be effected in a manner consistent with the principles of mutual respect and cooperation which the new relationship established by that Treaty is based.

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[14]The full text of Panama's ratification instruments appear only in 17 I.L.M. 817, 834-35 (1978).

[Emphasis added].

These three paragraphs are actually a counter-reservation nullifying the Deconcini Reservation. The Senate did not consent to the final version of the treaty that was signed by Panama.

Although not labeled a Counter-Reservation by the Panamanian government, these three paragraphs must be construed as such since treaties are construed more liberally than private agreements. Voldswagenwerk Aktiengesellschaft v. Schlunk, ____ U.S. ____, 108 S.Ct. 2104 (1988); Air France v. Saks, ____ U.S. ____, 105 S.Ct. 133 (1985). In this light, it is reasonable and proper to rely upon Senate pre-ratification committee

reports and floor debates in order to assist in giving effect to the intent of the parties. U.S. v. Stuart, ____ U.S. ____, 109 S.Ct. 1183 (1989); See also, Restatement (third) of the Foreign Relations Law of the Untied States §314.

In analyzing the two passages listed above, it is clear that the DeConcini statement is inconsistent with the Panamanian statement. The true meaning and purpose of the Reservation can be gleaned from the statement of Senator DeConcini when introducing his precondition during the Senate debates on the Neutrality Treaty:

> The [DeConcini Reservation] contains a very specific reference to the use of military force in Panama. I

> believe these words are absolutely crucial because they establish the American right -- which I am not convinced is adequately provided for either in the body of the treaty or the leadership amendment -- to take military action if the case so warrants. It further makes it clear that the United States can take military action on Panamanian soil without the consent of the Panamanian Government.... If America is to have any rights at all under this treaty, it must have the right to act independently to protect the canal and to keep it open.

[Emphasis added].

Hence, both the language and pre-ratification Senate debates indicate a strong desire of the Senate to reserve to the United States the independent right to intervene militarily, without the consent of the Panamanian Government, to insure the neutrality of

the canal. Looking at the Panamanian statement, it states that "measures to reopen the canal" must be exercised according to the principles of "mutual respect and cooperation."

Clearly, those statements are inconsistent with an independent right of the United States to intervene militarily.

The constitutional defect is that the United States and Panama did not ratify the same treaty. The Neutrality Treaty was rendered nugatory by the absence of Senate consent to the Panamanian additions, which were, in effect, Counter-Reservations. For these reasons as well, the Court of Appeals relied on a document, The Panama Canal Treaty, that violates the

United States Constitution, in their determination that the Panama Canal Commission is a United States Agency for purposes of 26 USC §911.

## CONCLUSION

This matter is one of first impression for the Court involving the status of the Panama Canal Commission as an agency of the United States government. For this reason, and others discussed at length herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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A. JOYCE PAYNE

v.

UNITED STATES OF AMERICA

No. 89-110

United States District Court,

D. Vermont.

Nov. 21, 1991

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COFFRIN, Senior District Judge.

In 1986, the Internal Revenue Service levied on Payne's bank accounts in partial satisfaction of unpaid 1982 federal income taxes. Payne commenced this action to recover the seized funds, and the Internal Revenue Service counterclaimed to reduce the assessment to judgment and moved for summary

judgment. We find Payne's 1982 income was not exempt from federal income taxation and grant the government's summary judgment motion.

BACKGROUND

In 1982, taxpayer Payne's late husband earned $75,780.00 while working for the Panama Canal Commission ("PCC") in the Republic of Panama. The Paynes reported these wages as gross income on their 1982 federal tax return but excluded the entire amount from their taxable income, claiming the Panama Canal Treaty of 1977 exempted it from taxation. The Internal Revenue Service ("IRS") processed the return and issued a refund.

On March 10, 1986, the IRS made a $106,672.88 assessment against the

Paynes for unpaid 1981 and 1982 taxes. Of this amount, $24,457.00 in back taxes and $9,477.90 in interest related to the 1982 tax year. When Payne did not pay the assessment, the IRS, on February 19, 1987, levied on Payne's bank account and received $32,630.49 which partially satisfied the total Payne allegedly owed.

In 1987, Payne brought suit in this court to recover the funds. She maintained the wages her husband had earned with the PCC were tax-exempt and also attacked the procedure the IRS had used to levy on her bank accounts for the 1981 taxes. The IRS conceded it had acted improperly with respect to the 1981 taxes and we granted summary judgment in Payne's favor on that

portion of her claim. Since we based our decision on the IRS' failure to follow proper procedure, we did not, at that time, resolve the question of whether Mr. Payne's PCC wages were exempt from taxation. Later, we dismissed Payne's 1982 tax year claim without prejudice because she had not initially sought a refund from the IRS, as required.

Having exhausted her administrative remedies, Payne filed this action in April 1989. She maintains her late husband's 1982 wages were exempt from federal income taxation and seeks a refund of the levied funds, plus interest. The United States counterclaimed to reduce the assessment to judgment and moved

for summary judgment. This summary judgment motion is now before the court.

DISCUSSION

I. Jurisdiction

This is a civil action against the United States for the recovery of an internal revenue tax alleged to have been erroneously or illegally assessed or collected. We have original jurisdiction over such matters under 28 U.S.C. §1346(a)(1).

II. Issues

Since 1987, when Payne first brought suit in this court, she has raised three different arguments to support her claim that she is not liable for any taxes on her husband's 1982 wages. First, she argued the

Panama Canal Treaty of 1977 exempted the earnings from federal income taxes. Second, she argued she did not sign the 1982 federal income tax return and is therefore not liable for taxes due, if any. Finally, she argued 26 U.S.C. §911 exempted her husband's wages from federal income taxes.

Following the Supreme Court's decision in O'Connor v. United States, 479 U.S. 27, 107 S.Ct. 347, 92 L.Ed.2d 206 (1986), it is clear the Panama Canal Treaty does not exempt from federal income taxation wages paid to PCC employees who are United States citizens. At oral argument in this matter Payne conceded the applicability of O'Connor to the facts of her case. In her papers, Payne has also admitted

she signed the joint 1982 return and is therefore liable for any taxes due. Plaintiff's Memorandum of Law in Opposition to Government's Motion for Summary Judgment at 1. Thus, Payne's sole remaining argument is that 26 U.S.C. §911 exempted Mr. Payne's 1982 wages from federal income taxation.

III. Standard of Review

The United States, as the moving party, is entitled to summary judgment if no genuine issues of material fact exist and it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The United States has the burden of demonstrating the absence of a material, factual dispute and we, in determining whether the United States has met this burden, must draw all

reasonable inferences and resolve all ambiguities in Payne's favor. Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988). However, we will enter judgment against Payne if she fails to set forth sufficient facts to establish she is entitled to an exemption. See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

IV. Section 911 Claim

Section 911[1] permits United

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[1]§911 reads in pertinent part:
**§911 Citizens or residents of the United States living abroad**
(a) **Exclusion from gross income.** - At the election of a qualified individual...there shall be excluded from the gross income of such individual, and exempt from taxation under this subtitle, for any taxable year-
(1) the foreign earned income of such individual....
(b) **Foreign earned income.** -

States Citizens who are bona fide residents of a foreign country to elect to exclude from federal income taxation that portion of their income they earn abroad. This exemption is subject to several exceptions and conditions, the most significant of which, for purposes of this matter, makes it inapplicable to wages paid by the United States or

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(1) **Definition.** - For purposes of this section

(A) **In general.** - The term "foreign earned income" with respect to any individual means the amount received by such individual from sources within a foreign county or countries which constitute earned income attributable to services performed by such individual....

(B) **Certain amounts not included in foreign earned income.** - The foreign earned income for an individual shall not include amounts-...

(ii) paid by the United States or an agency thereof to an employee of the United States of an agency thereof....

26 U.S.C. §911 (1982)

an agency thereof to an employee of the United States or an agency thereof. 26 U.S.C. §911(b)(1)(B)(ii). Therefore, if we determine the PCC is a United States agency for purposes of Section 911 then Mr. Payne's wages were not exempt from taxation, and we will grant the United States' motion for summary judgement.

The United States argues the Supreme Court's decision in O'Connor, 479 U.S. 27, 107 S.Ct. 247, forecloses Payne from bringing her Section 911 claim.[2] The United States reasons that in interpreting the Panama Canal

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[2]Since Ms. Payne was not a party to either O'Connor or its companion cases the United States cannot assert that those judgments are conclusive against her in this court. American Triticale Inc. v. Nytco Services, Inc., 664 F.2d 1126 (9th Cir. 1981).

Treaty so as to hold PCC wages subject to federal income taxation, the O'Connor court impliedly swept aside all other arguments in favor of exempting PCC wages, whether analyzed in the opinion or not.

A question not raised by counsel or discussed in the opinion of the court has not been decided merely because it existed in the record and might have been raised and considered. United States v. Mitchell, 271 U.S. 9, 14, 46 S.Ct. 418, 419-20, 70 L.Ed. 799 (1926); Gardella v. Chandler, 172 F.2d 402, 411 (2d Cir. 1949). In O'Connor, the Supreme Court focused solely on 26 U.S.C. Section 894, which involves the interaction of the Internal Revenue Code with government treaty

obligations. The court did not analyze the applicability of Section 911, even though it would have been dispositive of the case had the Court adopted the interpretation favored by Ms. Payne.[3] Therefore, Payne remains free to pursue her Section 911 claim.

As we stated earlier, if we find the PCC is an agency of the United States for purposes of Section 911 we need to go no further and will grant

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[3]Neither O'Connor, 479 U.S. 27, 107 S.Ct. 347 nor its companion case, United States v. Harris, 479 U.S. 957, 107 S.Ct. 450, 93 L.Ed.2d 398 (1986), mentions Section 911. Nor do the decisions at the court of appeals or trial levels. See Coplin v. United States, 6 Cl.Ct. 115 (1984) and Harris v. United States, 768 F.2d 1240 (11th Cir. 1985); Harris v. United States, 585 F.Supp. 862 (S.D.Ga. 1984). In these cases the taxpayers' sole arguments for exempting their PCC wages from federal income taxes was the Treaty of 1977.

the United State's summary judgment motion. The question of whether the PCC is an agency of the United States is a question of federal law to be decided by the court. See Standard Oil Co. v. Johnson, 316 U.S. 481, 483, 62 S.Ct. 1168, 1169, 86 L.Ed. 1611 (1942). We have a sufficient understanding of the relevant standards and the PCC's operations to make this determination without taking further evidence.

Although the term is not defined, there is little question the PCC is an agency of the United States. The legislation establishing the PCC identifies the body as an agency in the executive branch of the United States government. 22 U.S.C. §3611. The PCC is at least partially protected from

suit by the doctrine of sovereign immunity and many claimants are restricted to administrative remedies. See McClain v. Panama Canal Com., 834 F.2d 452 1191 (5th Cir. 1986). Before changing the toll it charges for passage through the Canal the PCC is required to provide notice in the Federal Register and an opportunity for comment. 22 U.S.C. §3794. Other courts have had little trouble categorizing the PCC as a federal agency. For instance, the Tax Court, in McCain v. Commissioner, 81 T.C. 918 (1983), faced the exact issue of whether the PCC is an agency for purposes of Section 911 and concluded it is. In O'Connor itself, Justice Scalia referred to the PCC as a "United

States Government agency." O'Connor, 479 U.S. at 28, 107 S.Ct. at 349.

Although it seems clear that the PCC is an agency of the United States and that the Section 911(b)(1)(B)(ii) exclusion applies to all such agencies, Payne argues that not all agencies are agencies for purposes of Section 911 and that not all compensation paid by such agencies is paid by an agency of the United States.

As a general rule, we will not imply an exemption, but instead, will require the taxpayer to prove it unambiguously. United States v. Wells Fargo Bank, 485 U.S. 351, 108 S.Ct. 1179, 1182, 99 L.Ed.2d 368 (1988). In determining the meaning of agency of the United States for purposes of

Section 911(b)(1)(B)(ii), this rule of strict construction means we must interpret the word"agency" broadly. Groves v. United States, 533 F.2d 1376, 1383 (5th Cir. 1976), cert. denied, 429 U.S. 1000, 97 S.Ct. 529, 50 L.Ed.2d 611 (1976).

Most courts faced with the issue of whether an agency's wages are exempt from federal income taxation have looked to the degree of control the government exercises over the entity. See Kalinski v. Commissioner, 528 F.2d 969 (1st Cir. 1976). The power to initiate and to terminate, the effectuation of government purposes paramount over those of organizers and members, the exclusion of private profit, and the limitation of

membership to government connected persons all serve to identify an agency. Id. at 973 (quoting Morse v. United States, 443 F.2d 1184, 1188, 195 Ct.Cl. 1 (1971), cert. denied, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 45 (1972)).

The United States has almost complete control over the activities of the PCC. The PCC is supervised by a board composed of nine members, a majority of which must be United States nationals. 22 U.S.C. §3612(a). The President of the United States has the power to appoint members of the PCC's board and in addition, the power to remove them, regardless of their nationality. 22 U.S.C. §3612(b). A quorum for the transaction of PCC

business consists of a majority of board members of which a majority of those present are United States nationals. Members of the board who are United States nationals are required to cast their votes in the manner directed by the Secretary of Defense. 22 U.S.C. §3612(a). Thus, the Secretary of Defense controls the outcome of any vote of the board, indicating the PCC is an agency of the United States.

The PCC meets another element of the control test if it effectuates government purposes as opposed to those of its organizers and members.[4] The

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[4]Some courts emphasize this factor to determine whether an entity is an agency of the United States. See Groves v. United States, 533 F.2d at 1383-84.

PCC is not a commercial venture; the operation of the Canal is a governmental exercise of the power of Congress to regulate commerce, rather than a proprietary or business activity of the government. McGehee v.Panma Canal Commission, 872 F.2d 1213, 1218 (5th Cir. 1989) (citing Rogers v. Graves, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937).

The signing of the Panama Canal Treaty of 1977 and the replacement of the Panama Canal Company with the Panama Canal Commission served to further emphasize the governmental nature of the Canal's operation as opposed to its commercial aspects.[5]

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[5]Payne argues that the fact the 1977 Treaty transferred sovereignty over the Canal Zone to the Republic of

While the Treaty and accompanying legislation vested the PCC with the power to perform a range of duties in the exercise of the rights of the United States with respect to management, operation, and maintenance of the Canal, they stripped the PCC of the power to perform many of the commercial activities previusly

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Panama with the result that the PCC now opeates within an area outside United States sovereignty indicates the PCC is not a United States agency. However, we believe it is the function of the entity in question, not the area in which it operates, that lies at the heart of the inquiry into whether it is a United States agency. Cf. Groves, 533 F.2d at 1284 (in reference to the Government of the Trust Territory of the Pacific Islands, an entity is an agency if its duties encompass fucntions which fall within the repsonsiblity of the United States, whether that responsiblity and its correlative power derive from sovereignty or from a truteeship agreement).

performed by the Panama Canal Company. The Treaty spun these collateral revenue producing businesses off to the Republic of Panama, leaving the operation of the Canal as the sole remaining mission of the PCC. Id. at 1218 (citing Hearings on HR 111 before Subcomm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 96-1 (1979) (Statement of Rep. Murphy). Thus, an analysis of the PCC under the governmental function test indicates it is an agency of the United States.

The PCC meets another element of the control test if it generates only governmental revenue as opposed to private profits. The PCC is required to deposit all its receipts in the Panama Canal Revolving Fund and cannot

spend any of this money unless specifically authorzed by law. 22 U.S.C. §3712(c)(1). The Revolving Fund is part of the United States Treasury and its assets are available to carry out the purposes, functions, and powers of the PCC. 22 U.S.C. §3712(a)(1). There are no provisions for private profit, and accordingly, the PCC meets this aspect of the control test.[6]

The final element of the contol test is whether PCC membership is limited to government connected

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[6]Payne argues that the fact the PCC is permitted to operate at a profit suggests the body is not a federal agency. We believe it is not the capacity to produce revenues in excess of expenditures, but rather, the inurement of profit to private interests, that is the strongest indicator an entity is not a federal agency. See Kalinski, 528 F.2d at 973 n. 13.

persons. All PCC employees are subject to the same duties and responsibilities as federal employees and must conform to a code of conduct that by statute incorporates restrictions substantially equivalent to provisions of law applicable to federal employees. 22 U.S.C. §3622(a); 22 U.S.C. §3622(b).[7] The head of any federal agency may enter into an agreement by which employees of that agency may serve a tour with the PCC and later return to their original employer without loss of pay, seniority, or other rights and benefits. 22 U.S.C.§3643(a). An employee who is denied reemployment

[7]The existing provisions include provisions relating to bribery, graft, and conflicts of interest, and the Ethics in Government Act. 22 U.S.C. §3622(b).

with his agency after service with the PCC can appeal to the Merit Systems Protection Board, even if he or she does not enjoy a veteran's preference. Noble v. Tennessee Valley Authority, 892 F.2d 1013, 1016 (Fed. Cir. 1989) (citing 5 C.F.R. 352.909), cert. denied, ____ U.S. ____, 110 S.Ct. 3214, 110 L.Ed.2d 622 (1990). The Federal Labor Relations Authority handles disputes arising between the PCC and its employee unions.[8] Panama Canal Com. v. Federal Labor Relations Authority, 867 F.2d 905 (5th Cir.

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[8]The purpose of the Federal Labor Relations Authority is to prescribe certain rights and obligations of the employees of the federal government and to establish procedures which are designed to meet the special requirements and needs of the government. 5 U.S.C. §7101(b).

1989). There are many other protections and restrictions applicable to PCC employees that are also distinctly similar to those accorded by the United States to its employees. However, we have already listed an adequate sample to show PCC employment is sufficiently connected to the government to satisfy this element of the control test.

The PCC is controlled by the United States government, operates to serve governmental purposes, does not benefit private interests, and is limited to government connected persons. Therefore, the essential characteristics of the PCC identify it as an agency of the United States, making the wages it pays subject to

federal income taxation.[9]

An analysis of the policies underlying Section 911 also indicates it is an agency for the purposes of the section. The section is designed to encourage citizens of the United States to go abroad to share technical skills. To place these venturesome citizens on an equal footing with citizens and other foreign nationals residing in the host country, who often are not taxed by their own nation, Congress eliminated the possibility of their being taxed by both the United States and the host country by allowing them to exclude their foreign earned income

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[9]Nothing in the cases suggest each and every element of the four part test must be met in order to attain agency status. Even if this were the case, the PCC satisfies each of them.

from their gross income for purposes of computing federal income tax. Congress added the exception for amounts paid by the United States government or an agency thereof to prevent a windfall to United States government employees in foreign countries. Since treaty provisions usually exclude United States government employees from paying income tax to their host country, excluding them from paying federal income taxes on their foreign earned wages was not necessary or desirable. See Smith v. Commissioner, 701 F.2d 807 (9th Cir. 1983) (citing McComish v. Commissioner, 580 F.2d 1323 (9th Cir. 1978.)). In O'Connor, 479 U.S. 27, 107 S.Ct. 347, the Supreme Court held that the Treaty of 1977 exempted from

Panamanian taxation wages earned by United States citizens employed by the PCC. Thus, subjecting Payne's PCC wages to federal income taxation does not levy a second tax upon them and granting Payne an exemption from federal taxation under Section 911 would free her from paying any income taxes and result in a windfall to her.

The cases cited by Payne do not persuade us the PCC is something other than an agency of the United States nor do they convince us it is necessary to take further evidence to make a decision in this matter. Krichbaum v. United States, 138 F.Supp. 515 (E.D. Tenn. 1956) held that where an agency of the United States merely serves as a conduit for funds paid to the worker

by a foreign nation, the employee's wages are exempt. This view has been expressly disregarded by appellate opinions such as Commissioner v. Wolfe, 361 F.2d 62 (D.C. Cir. 1966), cert. denied, Wolfe v. Commissioner, 385 U.S. 838, 87 S.Ct. 86, 17 L.Ed.2d 72 (1966), that look to the nature of the relationship between the entity and the worker, rather than to the source of the funds ultimately paid to the worker, in determining whether wages are exempt.[10] We favor the Wolfe view

[10]The court in Wolfe looked to factors such as who supervised the employee, who had the power to hire and fire the employee, and who were the actual parties to the employment contract, rather than to the source of funds paid to the employee. Were we to examine these factors here, it is clear the PCC an Payne had a traditional employer- employee relationship. There is no argument to support Payne's view

because we believe Krichbaum restricts too narrowly the definition of agency by making it depend on who fills the role of payor. See Kalinski, 528 F.2d at 973.

Brummitt v. United States, 329 F.2d 966, 165 Ct. Cl. 78 (1964) merely presents an application of the control test, where the relevant factors indicated the military club in question was not an agency of the United States. In Brummitt, the court found the club's considerable profits inured to private interests, the military exercised no fiscal control over the club or

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that her husband actually worked for the original source of the funds - the vessels passing through the Canal - and the PCC only served as a conduit to pass a portion of those funds to Payne's husband.

conducted any audits,[11] and one could join the club without being connected to the United States government. Thus, the essential elements of control were not present and the court held the club was not an agency of the United States.

McComish v. Commissioner, 580 F.2d 1323 held the Trust Territory of the Pacific Islands was not an agency for purposes of Section 911. It is necessary to contrast this case with Groves v. United States, 533 F.2d 1376 which held the Trust Territory was an agency for purposes of Section 911. The McComish court applied the control test and determined that the Trust

[11]The PCC, on the other hand, is subject to audit by the comptroller General of the United States, who must submit the audit to the Congress. 22 U.S.C. §3723(a).

Territory was not an agency of the United States because the United States could not dissolve the Trust Territory as an entity or change its trusteeship status without the consent of the United Nations.[12] The Groves court

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[12]We also note that the McComish court found the taxpayer in the case would have been subject to local income taxation at the time the case was written and therefore was not one of those employees who would have reaped windfall benefits in the absence of the Section 911 exception. McComish, 580 F.2d at 1326. Contrast this with the instant case where the Treaty of 1977 exempted Payne from paying Panamanian taxes and a like exemption from United States taxes would have created a windfall.

The McComish court also noted the equities of the taxpayer's status counseled against applying the exception to him. Specifically, the court found the fact that McComish received no federal retirement, social security, sickness, or disability benefits and was not exempted from the Federal Tort Claims Act inconsistent with taxing him as if he were a federal

looked at the function of the Trust Territory as well as aspects of control and determined that The Trusteeship Agreement's ceding of powers of administration, legislation, and jurisdiction to the United States[13]

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employee. Assuming arguendo that one should only be required to pay income taxes if they receive fringe benefits from their work, PCC employees are entitled to many of the same benefits as federal employees. See 22 U.S.C. §§3641-3701.

[13]McComish indicates the United State's power of administration is circumscribed by other provisions of the agreement. For instance, the United States is required to promote the development of self-government by the people of the Trust Territory and cannot alter the nature of the agreement without the consent of the United Nations. However, the fact that the United States is required to promote self-government does not prevent it from exercising control. Nor does the United Nations have power to freely alter the trusteeship agreement or to sanction the United States for the way it administers the

America of law enforcement and judicial jurisdiction only during the transition period. The United States of America may amend, repeal or otherwise change such laws, regulations and administrative authority. The two Parties shall consult concerning procedural and substantive matters relative to the implementation of this Article, including the disposition of cases pending at the end of the transition period and, in this respect, may enter into appropriate agreements by an exchange of notes or other instrument.

8. During this transition period, the United States of America may continue to incarcerate individuals in the areas and installations made

available for the use of the United States of America by the Republic of Panama pursuant to this Treaty and related agreements, or to transfer them to penal facilities in the United States of America to serve their sentences.

ARTICLE XII

A Sea-Level Canal or a Third Lane of Locks

1. The United States of America and the Republic of Panama recognize that a sea-level canal may be important for international navigation in the future. Consequently, during the duration of this Treaty, both Parties commit themselves to study jointly the feasibility of a sea-level canal in the Republic of Panama, and in the event they determine that such a waterway is necessary, they shall negotiate terms,

agreeable to both Parties, for its construction.

2. The United States of America and the Republic of Panama agree on the following:

(a) No new interoceanic canal shall be constructed in the territory of the Republic of Panama during the duration of this Treaty, except in accordance with the provisions of this Treaty, or as the two Parties may otherwise agree; and

(b) During the duration of this Treaty, the United States of America shall not negotiate with third States for the right to construct an interoceanic canal on any other route in the Western Hemisphere, except as the two Parties may otherwise agree.

3. The Republic of Panama grants to the United States of America the right to add a third lane of locks to the existing Panama Canal. This right may be exercised at any time during the duration of this Treaty, provided that the United States of America has delivered to the Republic of Panama copies of the plans for such construction.

4. In the event the United States of America exercises the right granted in paragraph 3 above, it may use for that purpose, in addition to the areas otherwise made available to the United States of America pursuant to this Treaty, such other areas as the two Parties may agree upon. The terms and conditions applicable to Canal operating

areas made available by the Republic of Panama for the use of the United States of America pursuant to Article III of this treaty shall apply in a similar manner to such additional areas.

5. In the construction of the aforesaid works, the United States of America shall not use nuclear excavation techniques without the previous consent of the Republic of Panama.

ARTICLE XIII

Property Transfer and
Economic Participation
by the Republic of Panama

1. Upon termination of this Treaty, the Republic of Panama shall assume total responsibility for the management, operation, and maintenance of the Panama Canal, which shall be turned over in operating condition and

free of liens and debts, except as the two parties may otherwise agree.

2. The United States of America transfers, without charge, to the Republic of Panama all right, title and interest the United States of America may have with respect to all real property, including non-removable improvements thereon, as set forth below:

(a) Upon the entry into force of this Treaty, the Panama Railroad and such property that was located in the former Canal Zone but that is not within the land and water areas the use of which is made available to the United States of America pursuant to this Treaty. However, it is agreed that the transfer on such date shall not include

buildings and other facilities, except housing, the use of which is retained by the United States of America pursuant to this Treaty and related agreements, outside such areas;

(b) Such property located in an area or a portion thereof at such time as the use by the United States of America of such area or portion thereof ceases pursuant to agreement between the two Parties.

(c) Housing units made available for occupancy by members of the Armed Forces of the Republic of Panama in accordance with paragraph 5(b) of Annex B to the Agreement in Implementation of Article IV of this Treaty at such time as such units are made available to the Republic of

Panama.

(d) Upon termination of this Treaty, all real property, and non-removable improvements that were used by the United States of America for the purposes of this Treaty and related agreements, and equipment related to the management, operation and maintenance of the Canal remaining in the Republic of Panama.

3. The Republic of Panama agrees to hold the United States of America harmless with respect to any claims which may be made by third parties relating to rights, title and interest in such property.

4. The Republic of Panama shall receive, in addition, from the Panama Canal Commission a just and equitable

return on the national resources which it has dedicated to the efficient management, operation, maintenance, protection and defense of the Panama Canal, in accordance with the following:

(a) An annual amount to be paid out of Canal operating revenues computed at a rate of thirty hundredths of a United States dollar ($0.30) per Panama Canal net ton or its equivalency, for each vessel transiting the Canal, after the entry into force of this Treaty, for which tolls are charged. The rate of thirty hundredths of a United States dollar ($0.30) per Panama Canal net ton, or this equivalency, will be adjusted to reflect changes in the United States wholesale price index[1]

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[1]See related letter, p. 140.

for total manufactured goods during biennial periods. The first adjustment shall take place five years after entry into force of this Treaty, taking into account the changes that occurred in such price index during the preceding two years. Thereafter successsive adjustments shall take place at the end of each biennial period. If the United States of America shbuld decide that another indexing method is preferable, such method shall be proposed to the Republic of Panama and applied if mutually agreed.

(b) A fixed annuity of ten million United States dollars ($10,000,000) to be paid out of Canal operating revenues. This amount shall constitute a fixed expense of the Panama

Canal Commission.

(c) An annual amount of up to ten million United States dollars ($10,000,000) per year, to be paid out of Canal operating revenues to the extent that such revenues exceed expenditures of the Panama Canal Commission including amounts paid pursuant to this Treaty. In the event Canal operating revenues in any year do not produce a surplus sufficient to cover this payment, the unpaid balance shall be paid from operating surpluses in future years in a manner to be mutually agreed.

ARTICLE XIV

Settlement of Disputes

In the event that any question should arise between the Parties

concerning the interpretation of this Treaty or related agreements, they shall make every effort to resolve the matter through consultation in the appropriate committees established pursuant to this treaty and related agreements, or, if appropriate, through diplomatic channels. In the event the Parties are unable to resolve a particular matter through such means, they may, in appropriate cases, agree to submit the matter to conciliation, mediation, arbitration, or such other procedure for the peaceful settlement of the dispute as they may mutually deem appropriate.

ANNEX

Procedures for the Cessation or Transfer of Activities Carried out by the Panama Canal Company and the Canal Zone Government and Illustrative List of the Functions that may be Performed

by the Panama Canal Commission

1. The laws of the Republic of Panama shall regulate the exercise of private economic activities within the areas made available by the Republic of Panama for the use of the United States of America pursuant to this Treaty. Natural or juridical persons who, at least six months prior to the date of signature of this Treaty, were legally established and engaged in the exercise of economic activities in the former Canal Zone, may continue such activities in accordance with the provisions of paragraphs 2-7 of Article IX of this Treaty.

2. The Panama Canal Commission shall not perform governmental or commercial functions as stipulated in

paragraph 4 of this Annex, provided, however, that this shall not be deemed to limit in any way the right of the United States of America to perform those functions that may be necessary for the efficient management, operation and maintenance of the Canal.

3. It is understood that the Panama Canal Commission, in the exercise of the rights of the United States of America with respect to the management, operation and maintenance of the Canal, may perform functions such as are set forth below by way of illustration:

a. Management of the Canal enterprise.

b. Aids to navigation in Canal waters and in proximity thereto.

c. Control of vessel movement.

d. Operation and maintenance of the locks.

e. Tug service of the transit of vessels and dredging for the piers and docks for the Panama Canal Commission.

f. Control of the water levels in Gatun, Alajuela (Madden) and Miraflores Lakes.

g. Non-commercial transportation services in Canal waters.

h. Meteorological and hydrographic services.

i. Admeasurement.

j. Non-commercial motor transport and maintenance.

k. Industrial security through the use of watchmen.

l. Procurement and warehousing.

m. Telecommunications.

n. Protection of the environment by preventing and controlling the spillage of oil and substances harmful to human or animal life and of the ecological equilibrium in areas used in

operation of the canal and the anchorages.

o. Non-commercial vessel repair.

p. Air conditioning services in Canal installations.

q. Industrial sanitation and health services.

r. Engineering design, construction and maintenance of Panama Canal Commission installations.

s. Dredging of the Canal Channel, terminal ports and adjacent waters.

t. Control of the banks and stabilizing of the

slopes of the Canal.

u. Non-commercial handling of cargo on the piers and docks of the Panama Canal Commission.

v. Maintenance of public areas of the Panama Canal Commission, such as parks and gardens.

w. Generation of electric power.

x. Purification and supply of water.

y. Marine salvage in Canal waters.

z. Such other functions as may be necessary or appropriate to carry out, in conformity with

this Treaty and related agreements, the rights and responsibilities of the United States of America with respect to the management, operation and maintenance of the Panama Canal.

4. The following activities and operations carried out by the Panama Canal Company and the Canal Zone Government shall not be carried out by the Panama Canal Commission, effective upon the dates indicated herein:

(a) Upon the date of entry into force of this Treaty:

(i) Wholesale and retail sales, including those through

commissaries, food stores, department stores, optical shops and pastry shops;

(ii) The production of food and drink, including milk products and bakery products;

(iii) The operation of public restaurants and cafeterias and the sale of articles through vending machines;

(iv) The operation of movie theaters, bowling alleys, pool rooms and other recreational and amusement facilities for the use of which a charge is payable;

(v) The operation of laundry and dry cleaning plants other than those operated for official use;

(vi) The repair and service of privately owned automobiles or the sale of petroleum or lubricants, including

the operation of gasoline stations, repair garages and tire repair and recapping facilities, and the repair and service of other privately owned property, including appliances, electronic devices, boats, motors, and furniture;

(vii) The operation of cold storage and freezer plants other than those operated for official use;

(viii) The operation of freight houses other than those operated for official use;

(ix) Commercial services to and supply of privately owned and operated vessels, including the construction of vessels, the sale of petroleum and lubricants and the provision of water, tug services not

related to the Canal or other United States Government operations, and repair of such vessels, except in situations where repairs may be necessary to remove disabled vessels form the Canal;

(x) Printing services other than for official use;

(xi) Maritime transportation for the use of the general public;

(xii) Health and medical services provided to individuals, including hospitals, leprosariums, veterinary, mortuary and cemetery services;

(xiii) Educational services not for professional training, including schools and libraries;

(xiv) Postal services;

(xv) Immigration, customs and

quarantine controls, except those measures necessary to ensure the sanitation of the Canal;

(xvi) Commercial pier and dock services, such as the handling of cargo and passengers; and

(xvii) Any other commercial activity of a similar nature, not related to the management, operation or maintenance of the Canal.

(b) Within thirty calendar months from the date of entry into force of this treaty, governmental services such as:

(i) Police;

(ii) Courts; and

(iii) Prison system.

5. (a) With respect to those activities or functions described in

paragraph 4 above, or otherwise agreed upon by the two Parties, which are to be assumed by the Government of the Republic of Panama or by private persons subject to its authority, the two Parties shall consult prior to the discontinuance of such activities or functions by the Panama Canal Commission to develop appropriate arrangements for the orderly transfer and continued efficient operation or conduct thereof.

(b) In the event that appropriate arrangements cannot be arrived at to ensure the continued performance of a particular activity or function described in paragraph 4 above which is necessary to the efficient management, operation or maintenance of the Canal, the Panama Canal Commission

may, to the extent consistent with the other provisions of this Treaty and related agreements, continue to perform such activity or function until such arrangements can be made.

AGREED MINUTE TO THE PANAMA CANAL TREATY

1. With reference to paragraph 1(c) of Article I (Abrogation of Prior Treaties and Establishment of a New Relationship), it is understood that the treaties, conventions, agreements and exchanges of notes, or portions thereof, abrogated and superseded thereby include:

(a) The Agreement delimiting the Canal Zone referred to in Article II of the Interoceanic Canal Convention of November 18, 1903 signed at Panama on

June 15, 1904.[1]

(b) The Boundary Convention signed at Panama on September 2, 1914.[2]

(c) The convention regarding the Colon Corridor and certain other corridors through the Canal Zone signed at Panama on May 24, 1950.[3]

(d) The Trans-Isthmian Highway Convention signed at Washington on March 2, 1936,[4] the Agreement supplementing that Convention entered into through an exchange of notes signed at Washington on August 31 and September

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[1]10 Bevans 678

[2]TS 610; 38 Stat. 1893; 10 Bevans 702.

[3]TIAS 3180; 6 UST 461.

[4]TS 946; 53 Stat. 1869; 10 Bevans 778

6, 1940,[5] and the arrangement between the United States of America and Panama respecting the Trans-Isthmian Joint Highway Board, entered into through an exchange of notes at Panama on October 19 and 23, 1939.[6]

(e) The Highway Convention between the United States and Panama signed at Panama on September 14, 1950.[7]

(f) The Convention regulating the transit of alcoholic liquors through the Canal zone signed at Panama on March

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[5]EAS 448; 58 Stat. 1593; 10 Bevans 796.

[6]EAS 168 54 Stat. 2278; 10 Bevans 788.

[7]TIAS 3181; 6 UST 480.

14, 1932.[8]

(g) The Protocol of an Agreement restricting use of Panama and Canal Zone waters by belligerents signed at Washington on October 10, 1914.[9]

(h) The Agreement providing for the reciprocal recognition of motor vehicle license plates in Panama and the Canal Zone entered into through an exchange of notes at Panama on December 7 and December 12, 1950,[10] and the Agreement establishing procedures for the reciprocal recognition of motor vehicle operator's licenses in the Canal Zone and Panama entered into through an

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[8]TS 861; 48 Stat. 1488; 10 Bevans 737.

[9]TS 597; 38 Stat. 2042; 10 Bevans 711.

[10]Not printed

exchange of notes at Panama on October 31,.1960.[11]

(i) The General Relations Agreement entered into through an exchange of notes at Washington on May 18, 1942.[12]

(j) Any other treaty, convention, agreement or exchange of notes between the United States and the Republic of Panama, or portions thereof, concerning the Panama Canal which was entered into prior to the entry into force of the Panama Canal Treaty.

2. It is further understood that the following treaties, conventions, agreements and exchanges of notes between the two Parties are not affected

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[11]TIAS 4716; 12 UST 301.

[12]EAS 452; 59 Stat. 1289.

by paragraph 1 of Article I of the Panama Canal Treaty:

(a) The Agreement confirming the cooperative agreement between the Panamanian Ministry of Agriculture and Livestock and the United States Department of Agriculture for the prevention of foot-and-mouth disease and rinderpest in Panama, entered into by an exchange of notes signed at Panama on June 21 and October 5, 1972,[13] and amended May 28 and June 2, 1974.[14]

(b) The Loan Agreement to assist Panama in executing public marketing programs in basic grains and perishables, with annex, signed at

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[13]TIAS 7482; 23 UST 3108.

[14]TIAS 7888; 25 UST 1522.

Panama on September 20, 1975.[15]

(c) The Agreement concerning the regulation of commercial aviation in the Republic of Panama, entered into by an exchange of notes signed at Panama on April 22, 1929.[16]

(d) The Air Transport Agreement signed at Panama on March 31, 1949,[17] and amended May 29 and June 3, 1952,[18] June 5, 1967,[19] December 23, 1974, and March 6, 1975.[20]

(e) The Agreement relating to

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[15]TIAS 8473; 28 UST 353.

[16]10 Bevans 729.

[17]TIAS 1932; 63 Stat. 2450; 10 Bevans 857.

[18]TIAS 2551; 3 UST 4087.

[19]TIAS 6270; 18 UST 1212.

[20]TIAS 8036; 26 UST 307.

the establishment of headquarters in Panama for a civil aviation technical assistance group for the Latin American area, entered into by an exchange of notes signed at Panama on August 8, 1952.[21]

(f) The Agreement relating to the furnishing by the Federal Aviation Agency of certain services and materials for air navigation aids, entered into by an exchange of notes signed at Panama on December 5, 1967 and February 22, 1968.[22]

(g) The Declaration permitting consuls to take note in person, or by authorized representatives, of declarations of

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[21]TIAS 2691; 3 UST 5064.

[22]TIAS 6471; 19 UST 4731.

values of exports made by shippers before customs officers, entered into by an exchange of notes signed at Washington on April 17, 1913.[23]

(h) The Agreement relating to customs privileges for consular officers, entered into by an exchange of notes signed at Panama on January 7 and 31, 1935.[24]

(i) The Agreement relating to the sale of military equipment, materials, and services to Panama, entered into by an exchange of notes signed at Panama on May 20, 1959.[25]

(j) The Agreement relating to the furnishing of defense articles and

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[23]TS 578; 10 Bevans 699.

[24]TIAS 3028; 5 UST 1520.

[25]TIAS 4234; 10 UST 1000.

services to Panama for the purpose of contributing to its internal security, entered into by an exchange of notes signed at Panama on March 26 and May 23, 1962.[26]

(k) The Agreement relating to the deposit by Panama of ten percent of the value of grant military assistance and excess defense articles furnished by the United States, entered into by an exchange of notes signed at Panama on April 4 and May 9, 1972.[27]

(l) The Agreement concerning payment to the United States of net proceeds from the sale of defense articles furnished under the military assistance program, entered into by an

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[26]TIAS 5081; 13 UST 1294.

[27]TIAS 7353; 23 UST 897.

exchange of notes signed at Panama on May 20 and December 6, 1974.[28]

(m) The General Agreement for Technical and Economic Cooperation, signed at Panama on December 11, 1961.[29]

(n) The Loan Agreement relating to the Panama City water supply system, with annex, signed at Panama on May 6, 1969, and amended September 30, 1971.[30]

(o) The Loan Agreement for rural municipal development in Panama, signed at Panama on November 28, 1975.[31]

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[28]TIAS 7977; 25 UST 3135.

[29]TIAS 4972; 13 UST 274.

[30]TIAS 8656; 28 UST 5711.

[31]TIAS 8925; 29 UST 2037.

(p) The Loan Agreement relating to a project for the modernization, restructuring and reorientation of Panama's educational programs, signed at Panama on November 19, 1975.[32]

(q) The Treaty providing for the extradition of criminals, signed at Panama on May 25, 1904.[33]

(r) The Agreement relating to legal tender and fractional silver coinage by Panama, entered into by an exchange of notes signed at Washington and New York on June 20, 1904,[34] and

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[32]TIAS 8647; 28 UST 5471.

[33]TS 445; 34 Stat. 2851; 10 Bevans 673.

[34]10 Bevans 681.

amended March 26 and April 2, 1930,[35] May 28 and June 6, 1931,[36] March 2, 1936,[37] June 1 1946,[38] May 9 and 24, 1950,[39] September 11 and October 22, 1953, August 23 and October 25, 1961,[39] and September 26 and October 23, 1962.[39]

(s) The Agreement for enlargement and use by Canal Zone of sewerage facilities in Colon Free Zone Area, entered into by an exchange of notes signed at Panama on March 8 and

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[35]10 Bevans 731.

[36]10 Bevans 734.

[37]10 Bevans 771.

[38]10 Bevans 834.

[39]Not printed.



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25, 1954.[40]

(t) The Agreement relating to the construction of the inter-American highway, entered into by an exchange of notes signed at Panama on May 15, and June 7, 1943.[41]

(u) The Agreement for cooperation in the construction of the Panama segment of the Darien Gap highway, signed at Washington on May 6, 1971.[42]

(v) The Agreement relating to investment guaranties under sec. 413(b)(4) of the Mutual Security Act of 1954, as amended, entered into by an

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[40]TIAS 2966; 5 UST 782.

[41]EAS 365; 57 Stat. 1298; 10 Bevans 826.

[42]TIAS 7111; 22 UST 602.

exchange of notes signed at Washington on January 23, 1961.[43]

(w) The Informal Arrangement relating to cooperation between the American Embassy, or Consulate, and Panamanian authorities when American merchant seamen or tourists are brought before a magistrate's court, entered into by an exchange of notes signed at Panama on September 18 and October 15, 1947.[44]

(x) The Agreement relating to the mutual recognition of ship measurement certificates, entered into by an exchange of notes signed at

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[43]TIAS 4976; 13 UST 293.

[44]Not printed.

Washington on August 17, 1937.[45]

(y) The Agreement relating to the detail of a military officer to serve as adviser to the Minister of Foreign Affairs of Panama, signed at Washington on July 7, 1942,[46] and extended and amended February 17, March 23, September 22 and November 6, 1959,[47] March 26 and July 6, 1962, and September 20 and October 8, 1962.[48]

(z) The Agreement relating to the exchange of official publications, entered into by an exchange of notes signed at Panama on November 27, 1941

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[45]EAS 106; 50 Stat. 1626; 10 Bevans 781.

[46]EAS 258; 56 Stat. 1545; 10 Bevans 817.

[47]TIAS 4773; 12 UST 718.

[48]TIAS 5226; 13 UST 2600.

and March 7, 1942.[49]

(aa) The Convention for the Prevention of Smuggling of Intoxicating Liquors, signed at Washington on June 6, 1924.[50]

(bb) The Arrangement providing for relief from double income tax on sipping profits, entered into by an exchange of notes signed at Washington on January 15, February 8, and March 28, 1941.[51]

(cc) The Agreement for withholding of Panamanian income tax from compensation paid to Panamanians

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[49]EAS 243; 56 Stat. 1444; 10 Bevans 805.

[50]TS 707; 43 Stat. 1363; 10 Bevans 717.

[51]EAS 221; 55 Stat. 1363; 10 Bevans 801.

employed within Canal Zone by the canal, railroad, or auxiliary works, entered into by an exchange of notes signed at Panama on August 12 and 30, 1963.[52]

(dd) The Agreement relating to the withholding of contributions for educational insurance from salaries paid to certain Canal Zone employees, entered into by an exchange of notes signed at Panama on September 8 and October 13, 1972.[53]

(ee) The Agreement for radio communications between amateur stations on behalf of third parties, entered into by an exchange of notes signed at Panama on July 19 and August 1, 1956.[54]

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[52]TIAS 5445; 14 UST 1478.

[53]TIAS 7509; 23 UST 3495.

[54]TIAS 3617; 7 UST 2179.

(ff) The Agreement relating to the granting of reciprocal authorizations to permit licensed amateur radio operators of either country to operate their stations in the other country, entered into by an exchange of notes signed at Panama on November 16, 1966.[55]

(gg) The convention facilitating the work of traveling salesmen, signed at Washington on February 8, 1919.[56]

(hh) The Reciprocal Agreement for gratis nonimmigrant visas, entered into by an exchange of notes signed at Panama on March 27 and May 22 and 25,

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[55]TIAS 6159; 17 UST 2215.

[56]TS 646; 41 Stat. 1696; 10 Bevans 714.

1956.[57]

(ii) The Agreement modifying the Agreement of March 27 and May 22 and 25, 1956 for gratis nonimmigrant visas, entered into by an exchange of notes signed at Panama on June 14 and 17, 1971.[58]

(jj) Any other treaty, convention, agreement or exchange of notes, or portions thereof, which does not concern the Panama Canal and which is in force immediately prior to the entry into force of the Panama Canal Treaty.

3. With reference to paragraph 2 of Article X (Employment with the Panama Canal Commission), concerning the

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[57]TIAS 3573; 7 UST 905.

[58]TIAS 7142; 22 UST 815.

endeavor to ensure that the number of Panamanian nationals employed in relation to the total number of employees will conform to the proportion established under Panamanian law for foreign business enterprises, it is recognized that progress in this regard may require an extended period in consonance with the concept of a growing and orderly Panamanian participation, through training programs and otherwise, and that progress may be affected from time to time by such actions as the transfer or discontinuance of functions and activities.

4. With reference to paragraph 10(a) of Article X, it is understood that the currently applicable United States law is that contained in Section

8336 of Title 5, United States Code.

5. With reference to paragraph 2 of Article XI (Transitional Provisions), the areas and installations in which the jurisdictional arrangements therein described shall apply during the transition period are as follows:

(a) The Canal operating areas and housing areas described in Annex A to the Agreement in Implementation of Article III of the Panama Canal Treaty.

(b) The Defense Sites and Areas of Military Coordination described in the Agreement in Implementation of Article IV of the Panama Canal Treaty.

(c) The Ports of Balboa and Cristobal described in Annex B of the Agreement in Implementation of Article III of the Panama Canal Treaty.

6. With reference to paragraph 4 of Article XI, the areas in which the police authorities of the Republic of Panama may conduct joint police patrols with the police authorities of the United States of America during the transition period are as follows:

(a) Those portions of the Canal operating areas open to the general public, the housing areas and the Ports of Balboa and Cristobal.

(b) Those areas of military coordination in which joint police patrols are established pursuant to the provisions of the Agreement in Implementation of Article IV of this Treaty, signed this date. The two police authorities shall develop appropriate administrative arrangements

for the scheduling and conduct of such joint police patrols.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal was signed at Washington on September 7, 1977, the text of which is hereto annexed;

The Senate of the United States of America by its resolution of March 16, 1978, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Neutrality treaty, subject to the following:

(a) AMENDMENTS:

(1) At the end of Article IV, insert the following:

"A correct and authoritative

statement of certain rights and duties of the Parties under the foregoing is contained in the Statement of Understanding issued by the Government of the United States of America on October 14, 1977, and by the Government of the Republic of Panama on October 18, 1977,[1] which is hereby incorporated as an integral part of this Treaty, as follows:

"'Under the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (the Neutrality Treaty), Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The

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[1]For joint Statement of Understanding, see Department of State Bulletin Nov. 7, 1977, p. 631.

correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels throughout the Canal.

"'This does not mean, nor shall it be interpreted as, a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure, and accessible, and it shall never be directed against the territorial integrity or political

independence of Panama.'."

(2) At the end of the first paragraph of Article VI, insert the following:

"In accordance with the Statement of Understanding mentioned in Article IV above: 'The Neutrality Treaty provides that the vessels of war and auxiliary vessels of the United States and Panama will be entitled to transit the Canal expeditiously. This is intended, and it shall so be interpreted, to assure the transit of such vessels through the Canal as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the Canal rapidly.'."

(b) CONDITIONS:

(1) Notwithstanding the provisions of Article V or any other provision of the Treaty, if the Canal is closed, or its operations are interfered with, the United Sates of America and the Republic of Panama shall each independently have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.

(2) The instruments of ratification of the Treaty shall be exchanged only upon the conclusion of a Protocol of Exchange, to be signed by authorized representatives of both

Governments, which shall constitute an integral part of the Treaty documents and which shall include the following:

"Nothing in the Treaty shall preclude the Republic of Panama and the United States of America from making, in accordance with their respective constitutional processes, any agreement or arrangement between the two countries to facilitate performance at any time after December 31, 1999, of their responsibilities to maintain the regime of neutrality established in the Treaty, including agreements or arrangements for the stationing of any United States military forces or the maintenance of defense sites after that date in the Republic of Panama that the Republic of Panama and the United States of America

may deem necessary or appropriate.".

(c) RESERVATIONS:

(1) Before the date of entry into force of the Treaty, the two Parties shall begin to negotiate for an agreement under which the American Battle Monuments Commission would, upon the date of entry into force of such agreement and thereafter, administer, free of all taxes and other charges and without compensation to the Republic of Panama and in accordance with the practices, privileges,and immunities associated with the administration of cemeteries outside the United States of America by the American Battle Monuments Commission, including the display of the flag of the Untied States of America, such part of Corozal Cemetery in the

former Canal Zone as encompasses the remains of citizens of the United States of America.

(2) The flag of the United States of America may be displayed, pursuant to the provisions of paragraph 3 of Article VII of the Panama Canal Treaty,[1] at such part of Corozal Cemetery in the former Canal Zone as encompasses the remains of citizens of the Untied States of America.

(3) The President--

(A) shall have announced, before the date of entry into force of the Treaty, his intention to transfer, consistent with an agreement with the Republic of Panama, and before the date of termination of the Panama Canal

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[1]TIAS 10031; post, p.141.

Treaty, to the American Battle Monuments Commission the administration of such part of Corozal Cemetery as encompasses the remains of citizens of the United States of America; and

(B) shall have announced, immediately after the date of exchange of the instruments of ratification, plans, to be carried out at the expense of the Government of the United States of America, for--

(i) removing, before the date of entry into force of the Treaty,the remains of citizens of the United States of America from Mount Hope Cemetery to such part of Corozal Cemetery as encompasses such remains, except that the remains of any citizen whose next of kin objects in writing to

the Secretary of the Army not later than three months after the date of exchange of the instruments of ratification of the Treaty shall not be removed; and

(ii) transporting to the United States of America for reinterment, if the next of kin so requests, not later than thirty months after the date of entry into force of the Treaty, any such remains encompassed by Corozal Cemetery and, before the date of entry into force of the Treaty, any remains removed from Mount Hope Cemetery pursuant to subclause (i); and

(C) Shall have fully advised, before the date of entry into force of the Treaty, the next of kin objecting under clause (B)(i) of all available options and their implications.

(4) To carry out the purposes of Article III of the Treaty of assuring the security, efficiency, and property maintenance of the Panama Canal, the United States of America and the Republic of Panama, during their respective periods of responsibility for Canal operation and maintenance, shall, unless the amount of the operating revenues of the Canal exceeds the amount needed to carry out the purposes of such Article, use such revenues of the Canal only for purposes consistent with the purposes of Article III.

(d) UNDERSTANDINGS:

(1) Paragraph 1(c) of Article III of the Treaty shall be construed as requiring, before any adjustment in tolls for use of the Canal, that the

effects of any such toll adjustment on the trade patterns of the two Parties shall be given full consideration, including consideration of the following factors in a manner consistent with the regime of neutrality:

(A) the costs of operating and maintaining the Panama Canal;

(B) the competitive position of the use of the Canal in relation to her means of transportation;

(C) the interests of both Parties in maintaining their domestic fleets;

(D) the impact of such an adjustment on the various geographical areas of each of the two Parties; and

(E) the interests of both Parties in maximizing their international

commerce.

The United States of America and the Republic of Panama shall cooperate in exchanging information necessary for the consideration of such factors.

(2) The Agreement 'to maintain the regime of Neutrality established in the Treaty' in Article IV of the Treaty means that either of the two Parties to the Treaty may, in accordance with its constitutional processes, take unilateral action to defend the Panama Canal against any threat, as determined by the Party taking such action.

(3) The determination of 'need or emergency' for the purpose of any vessel of war or auxiliary vessel of the United States of America or the Republic of Panama going to the head of the line of

vessels in order to transit the Panama Canal rapidly shall be made by the nation operating such vessel.

(4) Nothing in the Treaty, in Annex A or B thereto, in the Protocol relating to the Treaty, or in any other agreement relating to the Treaty, obligates the United States of America to provide any economic assistance, military grant assistance, security supporting assistance, foreign military sales credits, or international military education and training to the Republic of Panama.

(5) The President shall include all amendments, conditions, reservations, and understandings incorporated by the Senate in this resolution of ratification in the

instrument of ratification in the instrument of ratification to be exchanged with the Government of the Republic of Panama.

The Neutrality Treaty was ratified by the President of the United States of America on June 15,1978, subject to the said amendments, conditions, reservations and understandings, in pursuance of the advise and consent of the Senate, and was ratified on the part of the Republic of Panama on June 6, 1978;

It is provided in Article VIII of the Neutrality Treaty that the Neutrality Treaty shall enter into force simultaneously with the Panama Canal Treaty, six calendar months from the date of the exchange of the instruments

of ratification;

The instruments of ratification of the Neutrality Treaty were delivered at Panama on June 16, 1978, with the exchange of the instruments of ratification effective on April 1, 1979, and accordingly the Neutrality Treaty, subject to the said amendments, conditions, reservations and understandings, enters into force on October 1, 1979;

NOW THEREFORE, I, Jimmy Carter, President of the United States of America, proclaim and make public the Neutrality Treaty, subject to the said amendments, conditions, reservations and understandings, to the end that it shall be observed and fulfilled with good faith on and after October 1, 1979, by

the Untied States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-fourth day of September in the year of our Lord one thousand nine hundred seventy-nine and of the Independence of the United Sates of America the two hundred fourth.

By the President:

Warren Christopher
Acting Secretary of State

Jimmy Carter

# TREATY
# CONCERNING THE PERMANENT NEUTRALITY AND OPERATION OF THE PANAMA CANAL

The United States of America and the Republic of Panama have agreed upon the following:

## ARTICLE I

The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty. The same regime of neutrality shall apply to any other international waterway that may be built either partially or wholly in the territory of the Republic of Panama.

## ARTICLE II

The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war

it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects concerning the conditions or charges of transit, or for any other reason, and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflicts between other nations of the world. The foregoing shall be subject to the following requirements:

(a) Payment of tolls and other charges for transit and ancillary services, provided they have been fixed in conformity with the provisions of Article III (c);

(b) Compliance with applicable

rules and regulations, provided such rules and regulations are applied in conformity with the provisions of Article III;

(c) The requirement that transiting vessels commit no acts of hostility while in the Canal; and

(d) Such other conditions and restrictions as are established by this Treaty.

ARTICLE III

1. For purposes of the security, efficiency and proper maintenance of the Canal the following rules shall apply:

(a) The Canal shall be operated efficiently in accordance with conditions of transit through the Canal, and rules and regulations that shall be just, equitable and reasonable, and

limited to those necessary for safe navigation and efficient, sanitary operation of the Canal;

(b) Ancillary services necessary for transit throughout the Canal shall be provided;

(c) Tolls and other charges for transit and ancillary services shall be just, reasonable, equitable and consistent with the principles of international law;

(d) As a pre-condition of transit, vessels may be required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate indemnification, consistent with international practice and standards, for damages resulting from acts or

omissions of such vessels when passing through the Canal. In the case of vessels owned or operated by a State or for which it has acknowledged responsibility, a certification by the state that it shall observe its obligations under international law to pay for damages resulting from the act or omission of such vessels when passing through the Canal shall be deemed sufficient to establish such financial responsibility;

(e) Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament, without being subjected, as a condition of transit, to

inspection, search or surveillance. However, such vessels may be required to certify that they have compiled with all applicable health, sanitation and quarantine regulations. In addition, such vessels shall be entitled to refuse to disclose their internal operation, origin, armament, cargo or destination. However, auxiliary vessels may be required to present written assurances, certified by an official at a high level of the government of the State requesting the exemption, that they are owned or operated by that government and in this case are being used only on government non-commercial service.

2. For the purposes of this Treaty, the terms "Canal," "vessel of war," "auxiliary vessel," "internal

operation," "armament" and "inspection" shall have the meanings assigned them in Annex A to this Treaty.

ARTICLE IV

The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any other treaties entered into by the two Contracting Parties.[1]

ARTICLE V

After the termination of the Panama

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[1]Amended pursuant to Senate resolution advising ratification. See pp. 3 and 32. TIAS 10030; post, p. 39.

Canal Treaty,[1] only the Republic of Panama shall operate the Canal and maintain military forces, defense sites and military installations within its national territory.

ARTICLE VI

1. In recognition of the important contributions of the United States of America and of the Republic of Panama to the construction, operation, maintenance, and protection and defense of the Canal, vessels of war and auxiliary vessels of those nations shall, notwithstanding any other provisions of this Treaty, be entitled to transit the Canal irrespective of their internal operation, means of

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[1]Amended pursuant to Senate resolution advising ratification. See pp. 4 and 32.

propulsion, origin, destination, armament or cargo carried. Such vessels of war and auxiliary vessels will be entitled to transit the Canal expeditiously.[1]

2. The United States of America, so long as it has responsibility for the operation of the Canal, may continue to provide the Republic of Colombia toll-free transit through the Canal for its troops, vessels and materials of war. Thereafter, the Republic of Panama may provide the Republic of Colombia and the Republic of Costa Rica with the right of toll-free transit.

ARTICLE VII

1. The United States of America and the Republic of Panama shall jointly

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[1]TIAS 10029

sponsor a resolution in the Organization of American States opening to accession by all States of the world the Protocol to this Treaty whereby all the signatories will adhere to the objectives of this Treaty, agreeing to respect the regime of neutrality set forth herein.

2. The Organization of American States shall act as the depositary for this Treaty and related instruments.

ARTICLE VIII

This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the

Panama Canal Treaty, signed this date, are exchanged. The Treaty shall enter into force, simultaneously with the Panama Canal Treaty, six calendar months from the date of the exchange of the instruments of ratification.[1]

ANNEX A

1. "Canal" includes the existing Panama Canal, the entrances thereto and the territorial seas of the Republic of Panama adjacent thereto, as defined on the map annexed hereto (Annex B), and any other inter-oceanic waterway in which the United States of America is a participant or in which the United States of America has participated in connection with the construction or financing, that may be operated wholly

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[1]Oct. 1, 1979.

or partially within the territory of the Republic of Panama, the entrances thereto and the territorial seas adjacent thereto.

2. "Vessel of war" means a ship belonging to the naval forces of a State, and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew which is under regular naval discipline.

3. "Auxiliary vessel" means any ship, not a vessel of war, that is owned or operated by a State and used, for the time being, exclusively on government non-commercial service.

4. "Internal operation"

encompasses all machinery and propulsion systems, as well as the management and control of the vessel, including its crew. It does not include the measures necessary to transit vessels under the control of pilots while such vessels are in the Canal.

5. "Armament" means arms, ammunition, implements of war and other equipment of a vessel which possesses characteristics appropriate for use for warlike purposes.

6. "Inspection" includes on-board examination of vessel structure, cargo, armament and internal operation. It does not include those measures strictly necessary for admeasurement, nor those measures strictly necessary to assure safe, sanitary transit and navigation,

including examination of deck and visual navigation equipment, nor in the case of live cargoes, such as cattle or other livestock, that may carry communicable diseases, those measures necessary to assure that heath and sanitation requirements are satisfied.

Supreme Court, U.S.
FILED
JUN 1 1993
OFFICE OF THE CLERK

No. 92-1621

# In the Supreme Court of the United States

OCTOBER TERM, 1992

A. JOYCE PAYNE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether wages paid to United States citizens by the Panama Canal Commission are exempt from federal income taxation under Section 911 of the Internal Revenue Code.

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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No. 92-1621

A. JOYCE PAYNE, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-36a) is reported at 778 F. Supp. 804. The opinion of the court of appeals (Pet. App. 1b-26b) is reported at 980 F.2d 148.

### JURISDICTION

The judgment of the court of appeals was entered on November 25, 1992. On February 22, 1993, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including March 25, 1993. The petition for a writ of certiorari was filed on March 25, 1993. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. During 1982, Arthur C. Payne was an employee of the Panama Canal Commission ("PCC") and resided in the Republic of Panama. He received wages of $75,780 from the PCC in that year. Mr. Payne and his wife (the petitioner in this case)[1] were United States citizens and were therefore required to file a United States income tax return. In submitting their joint return for 1982, however, they excluded the PCC wages from taxable income on the ground that the Panama Canal Treaty exempted PCC wages from federal taxation (Pet. App. 2a, 5b).

The Internal Revenue Service determined that Mr. Payne's PCC wages were not excludable from taxable income and, on March 10, 1986, made an assessment of $24,457 in tax and $9,477.90 in interest with regard to the Paynes' 1982 tax year (Pet. App. 2a-3a).[2] Petitioner did not pay the assessment. The Service therefore levied upon funds in her bank account and applied those funds to her tax liability (Pet. App. 3a, 6b-7b). Petitioner filed a claim for refund and then commenced this refund action in federal district court (Pet. App. 4a, 7b).[3]

Petitioner contended that PCC wages were exempt from United States taxation under Section 911 of the Internal Revenue Code (as "foreign earned income") and

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[1] Mr. Payne died in 1985 (Pet. App. 6b).

[2] An assessment was also made with regard to the Paynes' 1981 tax year (Pet. App. 2a-3a, 6b), but that year is not at issue here.

[3] The amount seized by the government's levy satisfied in full petitioner's unpaid tax liability but not the assessed interest. Because the tax obligation was fully paid, the district court had jurisdiction over petitioner's suit even though some of the interest remained unpaid. See *Flora* v. *United States*, 362 U.S. 145, 171 n.37 (1960). The United States filed a counterclaim for the balance of the interest (Pet. App. 4a-5a, 7b-8b).

that the exception to that statute for wages paid by a United States agency (26 U.S.C. 911(b)(1)(B)(ii)) did not apply to PCC employees because the PCC was not an agency of the United States (Pet. App. 6a, 8b).

2. The district court granted summary judgment to the United States. The court held that "there is little question the PCC is an agency of the United States" (Pet. App. 13a). In reaching this conclusion, the court looked to the legislation establishing the PCC and to the degree of control that the United States maintains over the PCC (Pet. App. 13a-26a). The court stated that the factors emphasized in *Kalinski* v. *Commissioner*, 528 F.2d 969 (1st Cir. 1976), and *Morse* v. *United States*, 433 F.2d 1185 (Ct. Cl. 1971), cert. denied, 405 U.S. 989 (1972), require the conclusion that the PCC is an agency of the United States and that the wages earned by petitioner's late husband from the PCC were therefore subject to federal income tax under 26 U.S.C. 911(b)(1)(B)(ii) (Pet. App. 25a-26a, 35a-36a).

The court of appeals affirmed (Pet. App. 1b-26b). Applying the factors set forth in *Kalinski* v. *Commissioner*, *supra*, the court held that the PCC was "under the control of the United States and must be considered an agency under § 911" (Pet. App. 21b). The court therefore concluded that the PCC wages received by petitioner's husband were subject to the federal income tax (*ibid.*).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

The world-wide income of United States citizens is subject to taxation by the United States regardless of the citizen's residence or the source of such income. 26

U.S.C. 1. See *Cook* v. *Tait*, 265 U.S. 47, 56 (1924). Section 911(a)(1) of the Internal Revenue Code provides, however, that, "[a]t the election of a qualified individual * * *, there shall be excluded from the gross income of such individual, and exempt from taxation * * *, the foreign earned income of such individual." 26 U.S.C. 911(a)(1). Section 911(b)(1)(B) of the Code, however, excludes from the definition of "foreign earned income" all amounts "paid by the United States or any agency thereof to an employee of the United States or an agency thereof" (26 U.S.C. 911(b)(1)(B)(ii)).

The courts below correctly rejected (Pet. App. 12a-28a, 35a-36a, 10b-26b) petitioner's contention that the Panama Canal Commission is not a United States agency and that wages paid by the PCC to United States citizens are exempt from federal income taxation as foreign earned income under Section 911. The 1977 Panama Canal Treaty (Treaty) states that "the United States of America shall * * * carry out its responsibilities [under this treaty] by means of a United States Government agency called the Panama Canal Commission, which shall be constituted by and in conformity with the laws of the United States of America" (Pet. App. 24c; Treaty Art. III, ¶ 3). The statute enacted to establish the PCC further emphasizes that the PCC is a United States agency: "There is established in the executive branch of the United States Government an agency to be known as the Panama Canal Commission" (22 U.S.C. 3611).

Courts have consistently recognized that the PCC is a United States agency. For example, this Court stated that the PCC is a "United States Government agency" in *O'Connor* v. *United States*, 479 U.S. 27, 28 (1986), as did the Fifth Circuit in *McGehee* v. *Panama Canal Comm'n*, 872 F.2d 1213, 1215 (1989). The Tax Court, addressing the specific issue involved in this case, held

that the PCC is an agency of the United States for the purposes of Section 911 in *McCain* v. *Commissioner*, 81 T.C. 918, 924 (1983).

Even setting aside the plain language of the Treaty and the legislation establishing the PCC, the PCC would qualify as an agency of the United States under the general test adopted by the courts, which looks "to the degree of control the government exercises over the entity" (Pet. App. 16a, 10b-11b). Courts have looked to the four factors specified and evaluated in *Kalinski* v. *Commissioner*, 528 F.2d at 973, and *Morse* v. *United States*, 443 F.2d at 1188, for this purpose: (i) the power of the United States to initiate and terminate the entity, (ii) whether the entity effectuates governmental purposes, (iii) whether the entity generates private profits, and (iv) whether employment at the entity is limited to persons connected with the government. Petitioner agrees that these are proper factors to consider (Pet. 9-10), but differs with the lower courts in their application.

The courts below correctly applied these factors to conclude that the PCC is an agency of the United States. The PCC was created by legislation enacted by the United States Congress (22 U.S.C. 3601-3871) and will cease its operations under the terms of the Treaty to which the United States is a party (Pet. App. 20a; Treaty Art. II, ¶ 2). The United States has primary authority over the hiring and firing of employees of the PCC (Pet. App. 52c-63c; Treaty Art. X), as well as over the appointment and removal of the Administrator and Deputy Administrator and of the members of the Supervisory Board (Pet. App. 25c-27c; Treaty Art. III, ¶ 3(a)-(d)). A majority of the members of the Supervisory Board must be United States nationals (Pet. App. 25c; Treaty Art. III, ¶ 3(a)), and those members are required to vote as directed by the United States Secretary of Defense (22

and the fact that a high percentage of governmental funds came for the United States were sufficient indicia of United States control to find the Trust Territory was an agency of the United States for purposes of Section 911.

Although we believe there are sufficient indicia of control to find the Trust Territory was a United States agency for purposes of Section 911 we see no need to confirm our suspicion by conducting such an analysis here. Rather, we note each court's

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agreement. The Trust Territory's status as a strategic area places related matters before the Security Council. Since the United States has the power to veto affirmative acts of the Security Council it can insulate itself from affirmative acts of the United Nations with respect to its administration of the Trust Territory. See Groves 533 F.2d at 1384 n. 13.

methodology was consistent with the other's and our own. There was merely a disagreement over how to analyze the relevant facts. We see little similarity between the PCC, which is directly controlled by the Secretary of Defense, and the Trust Territory of the Pacific Islands, which is arguably a foreign sovereign operating under the wing of the United States, and therefore find McComish unpersuasive on the issue of whether the PCC is an agency of the United States.[14]

CONCLUSION

We find the Panama Canal

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[14]Nor does the apparent conflict between Groves and McComish alter our belief we have sufficient information regarding the operation of the PCC to make the determination it is an agency of the United States.

Commission is an agency of the United States and therefore, 26 U.S.C. Section 911 does not exempt from federal income taxation wages the PCC pays its employees who are United States citizens. Payne's 1982 income is subject to federal income taxation and she is liable for any amount due. For the foregoing reasons, the motion of the United States for summary judgment is granted.

The Clerk of Court shall enter judgment for the United States. No costs.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 235 August Term 1992
(Argued Nov 5, 1992
Decided Nov. 25, 1992)

Docket No. 92-6017

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A. JOYCE PAYNE,

Appellant,

v.

UNITED STATES,

Appellee.

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Before:

TIMBERS, VAN GRAAFEILAND, and McLAUGHLIN, Circuit Judges.

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Appeal from a summary judgment entered in the District of Vermont, Albert W. Coffrin, Senior District Judge, 778 F. Supp. 804 (D. Vt. 1991), holding that the Panama Canal

Commission qualifies as an agency of the United States for purposes of 26 U.S. C. §911 (1988), and that wages paid to its employees, including appellant's husband, were not excludable from taxable income as foreign earned income.

Affirmed.

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Rober A. Gensburg, St. Johnsbury, VT, for appellant.

David E. Carmack, Atty., Tax Division, Dept. of Justice, Washington, D.C. (James A. Bruton, Acting Asst. Atty. Gen., Gary R. Allen and Randolph L. Hutter, Attys., Tax Division, Dept. of Justice, Washington, D.C.; and Charles A. Caruso, U.S. Atty., Rutland, VT, on the brief), for appellee.

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TIMBERS, Circuit Judge:

In this case of first impression at the appellate level, appellant A. Joyce Payne appeals from a summary

judgment in favor of the United States and against Payne, entered in the District of Vermont, Albert W. Coffrin, Senior District Judge, 778 F. Supp. 804 (D.Vt. 1991). The Court held, as a matter of law, that the Panama Canal Commission ("PCC" was an agency of the United States Government, and therefore, wages paid to employees of that agency, including appellant's husband, are not excludable from taxable income under 26 U.S.C. §911 (1988), which exempts from taxation foreign earned income of citizens living abroad, unless such income is received from the United States or an agency thereof.

On appeal, Payne challenges the summary judgment, claiming that the PCC

is not an agency of the United States Government, and thus any income earned by employees of the PCC is exempt from taxation under §911. She further claims that, even if the PCC does qualify as an agency of the United States, the income earned by its employees is not paid by the United States or an agency thereof, and therefore is exempt under §911. Finally, she claims that summary judgment was improperly granted.

We reject all of Payne's claims on appeal and affirm the summary judgment in favor of the United States.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised

on appeal.

In 1981 and 1982, appellant's husband was a United States citizen employed by the PCC. Appellant and her husband resided in Panama. The couple filed a joint United States income tax return for those years, excluding from their taxable income the amount Mr. Payne earned from the PCC. They claimed that this income was exempt under the Panama Canal Treaty of 1977 ("Treaty").

The Paynes also believed that, aside from to the Treaty, the income also was exempt under §911 of the Internal Revenue Code. This provision exempts from taxation foreign earned income of citizens residing abroad, unless the income is paid by the United

States or an agency thereof. 26 U.S.C. §911(b)(1)(B)(ii) (1988).

Mr. Payne died in 1985. On March 10, 1986, the IRS assessed $106,672.88 against the Paynes, representing unpaid taxes for the tax years 1981 and 1982. Of this sum, $33,934.90 represented back taxes and interest for 1982. On November 4, 1986, the Supreme Court held that the Treaty did not bar the United States from taxing wages paid to employees of the PCC. O'Connor v. United States, 479 U.S. 27 (1986) (Treaty only exempts PCC employees from Panamanian taxes). Appellant, nevertheless, did not pay the assessment. In February 1987, the IRS levied on her bank account, obtaining $32,630.49 in partial satisfaction of

the assessment.

Appellant in April 1987 first commenced this action in the district court to recover the levied funds. The court granted summary judgment in appellant's favor as to the 1981 taxes, based on the IRS' failure to follow proper procedure in levying upon those funds. The court did not address the issue of whether the PCC wages were exempt from taxation under §911. It dismissed the claim involving the 1982 taxes because of appellant's failure to exhaust her administrative remedies.

In April 1989, appellant, having exhausted her administrative remedies, commenced this action, once again seeking a refund of the levied funds, plus interest, for the 1982 taxes. The

United States counterclaimed to reduce the assessment to a judgment. It moved for summary judgment because appellant admitted that she and her husband filed a joint tax return, making her personally liable for any deficiency on the return. Following O'Connor, the court held that the Treaty did not create a tax exemption. Appellant, however, claiming that O'Connor did not hold that the PCC was an "agency" under §911, asserted that she qualified for that exemption from taxation.

The district court, after a hearing on the motion for summary judgment, held that, although O'Connor was not controlling on the issue of the §911 exemption, the legislation which created the PCC and case law which

discusses what constitutes an agency of the United States show that the PCC is an agency, thus creating United States income tax liability for employees of the PCC.

On appeal, appellant contends that she never had an opportunity to develop a factual record to show why the PCC is not an agency within the meaning of §911, and that the order granting summary judgment was not appropriate.

II.

It is common ground that a court shall grant summary judgment if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Thus, if the PCC is an

agency, appellant is liable for her 1982 taxes as a matter of law, and summary judgment was appropriate.

(A) The PCC is an Agency of the United States

No other court at the appellate level has addressed the issue of whether the PCC is an agency. But see McCain v. Commissioner, 81 T.C. 918 (1983) (Tax Court held that the PCC is an agency for purposes of §911). Both parties here agree that the proper test for determining what constitutes an agency is one which measures the degree of control the government exercises over the entity involved. Factors to be examined include: (1) power of the United States to initiate and terminate; (2) effectuation of government purposes by the entity; (3)

exclusion of private profit; and (4) limitation of employment to government-connected persons. Kalinski v. Commissioner, 528 F.2d 969, 973 (1 Cir. 1976); Morse v. United States, 443 F.2d 1185, 1188 (Ct. Cl. 1971), cert. denied, 405 U.S. 989 (1972).

Appellant contends that the PCC fails the first part of the control test in that the United States neither created nor has the power to dissolve the PCC. Appellant claimed at oral argument before us that the district court ignored the Treaty. She asserted that it was the Treaty, a joint undertaking between the United States and Panama, which actually created the PCC and that the Treaty states that the PCC shall remain in existence through

1999. Panama Canal Treaty, art. III, §3(a). Thus, so her argument goes, the United States does not have the power to terminate the PCC.

This argument, however, requires a narrow reading of the terms "initiate" and "terminate." Although the Treaty required the United States to create the PCC, the plain language of the Treaty refers to it as "a United States Government agency...which shall be constituted by and in conformity with the laws of the United States of America." Treaty, art. III, §3. The PCC was created by legislation enacted by the United states Congress which established the laws and procedures under which the PCC operates. 22 U.S.C. §§3601-3872 (1988 & Supp. 1992).

The language of the legislation makes it clear that the PCC is an agency in the Executive Branch of the United States Government, operating under the authority of the President as exercised through the Secretary of Defense. 22 U.S.C. §3611 (1988). The Secretary of Defense can direct how United States nationals on the supervisory Board of the PCC shall vote. 22 U.S.C. §3612(a) (1988). The legislation further requires that at least five of the nine Board members be United States nationals, the Secretary of Defense effectively controls the outcome of any decision of the Board. Even though the United States cannot technically terminate the PCC, it can terminate any decision or action of the

PCC.

Further, it is the President who, with the advice and consent of the Senate, shall appoint the United States nationals who are members of the PCC supervisory Board. This gives the United States control over the appointment of the majority of the Board. And although Panamanians propose their nationals for the Board, the United States actually makes the appointments and controls which of the proposed members are selected. Finally, regardless of the nationality of a Board member, it is the President who appoints and can terminate the administrator and the deputy administrator. 22 U.S.C. §3613 (1988). Based on these factors, even if the

Treaty technically may have created the PCC, the Untied States has tremendous control over initiating and terminating the membership and policies of the PCC.

The next question for determining if the PCC is an agency is whether it was established to effectuate government purposes. The plain language of the Treaty is convincing. It states that "[T]he United States of America shall...carry out its responsibilities [under the Treaty] by means of a United States Government agency called the Panama Canal Commission...." Treaty, art. III, §3.

This language shows that the PCC was established to effectuate the government's responsibilities and duties under the Treaty, and not, as

appellant asserts, to act solely as a managing agent and trainer for Panamanians before the final transfer of the Panama Canal. The United States, in operating the Canal, is performing the governmental exercise of the power of Congress to regulate commerce; it is not performing a purely proprietary or business activity for the government. Rogers v. Graves, 299 U.S. 401, 406 (1937), overruled on other grounds by Graves v. New York, 306 U.S. 466 (1939); McGehee v. Panama Canal Comm'n, 872 F.2d 1213, 1218 (5 Cir. 1989).

The third element which establishes the United States' control over an agency is whether it generates government revenue as opposed to

private profits. The statute, 22 U.S.C. §3712(c)(1)(1988), requires the PCC to deposit all of its receipts in the Panama Canal Revolving Fund, a part of the United States Treasury. Such funds cannot be expended without authorization by law. Even if the PCC operates at a profit, the assets can be used only to carry out the purposes of the PCC and cannot be spent without specific authorization of law.

Appellant asserts that payments made by the PCC to the Republic of Panama, as agreed to under the Treaty for use of its natural resources, constitute a private profit. Appellant says that a private profit is earned unless all revenues are for the benefit of the United States. Aside from the

fact that the republic of Panama is not a private entity, we reject this assertion because the payments to Panama are for government services and there is no evidence of private profit being generated by the PCC.

The final factor in determining whether the PCC is an agency is whether its membership is limited to government-connected persons. There is no specific definition of who is "government-connected." Appellant asserts that, since there are Panamanians on the Board who are employed by the PCC (with their number to increase over the term of the PCC), such employees cannot be government-connected.

In making this assertion,

appellant ignores the fact that the PCC employees are subject to the same duties and responsibilities as federal employees, and that the PCC legislation creates a code of conduct which is substantially similar to the laws applicable to federal employees. In fact, the President established the Panama Canal Board of Appeals, which makes the "final and conclusive" determination for employee grievances about job classification and pay rates. 22 U.S.C. §§3660-3662 (1988). Further, it is the Federal Labor Relations Authority which handles disputes between the PCC and the employees' union. Panama Canal Comm'n v. Federal Labor Relations Auth., 867 F.2d 905 (5 Cir. 1989). Moreover,

United States citizen employees of the PCC, under certain conditions, are eligible for federal benefits such as civil service retirement, disability, and death benefits. 22 U.S.C.§3649 (1988). These factors provide sufficient evidence of a government connection to the employees of the PCC. The PCC thus complies with the final prong of the test for control

Appellant compares the PCC to the Trust Territory of the Pacific Islands ("TTPI"), which the Ninth Circuit held was not an agency. McComish v. Commissioner, 580 F.2d 1323 (9 Cir. 1978). But see Groves v. United States, 533 F.2d 1376 (5 Cir.), cert. denied, 429 U.S. 1000 91976) (holding that the TTPI is an agency) even if we

were to agree that the TTPI is not an agency, it is sufficiently different in character to distinguish it from the PCC. The TTPI is a quasi-sovereign territory with its own tripartite government. McComish, supra, 580 F.2d at 1329. Unlike the TTPI, the PCC is not a sovereign or even quasi-sovereign body; it is subject to the laws of the United States. This analogy therefore is not dispositive.

We hold that the PCC is under the control of the United States and must be considered an agency under §911. Employees of the PCC are not exempt from paying United States income taxes.

(B) Appellant's Income Was Paid by an Agency of the United States

Appellant also claims that, even if the PCC is an agency, her husband

was not paid by that agency. She bases this on the fact that the PCC funds, which paid the salary, came from revenues from the Canal's operation. Since the funds did not come directly from the United States government, she says that it was not the United States (or an agency thereof) that paid her husband.

We reject this claim based on legal precedent in this area. Whenever an employee of the United States or any agency thereof receives wages from such an employer, the source of the wages is irrelevant; the employee is not exempt from paying taxes under §911. C.I.R. v. Mooneyhan, 404 F.2d 522, 527 (6 Cir. 1968) (although a foreign country was the source of funds, as an employee of

the United States one is paid by an agency of the United States and cannot seek §911 exemption), cert. denied, 394 U.S. 1001 (1969). Here, it was the PCC, an agency of the United States, which paid Mr. Payne's wages. The Treaty itself refers to the United States as the employer of PCC personnel. Congress regulates the wages for PCC employees. 2 U.S.C. §§3655-57, 3665 (1988). It is irrelevant that the funds for these wages did not come directly out of United States taxpayers' pockets.

Appellant cites Krichbaum v. United States, 138 F. Supp. 515 (E.D. Tenn. 1956), for the proposition that the §911 exemption applies when a foreign government's funds pay a United

States agency employee's salary. The instant case is readily distinguishable from Krichbaum. In Krichbaum, the foreign country was responsible for providing the employee's salary. Here, it is the United States which ultimately is responsible for paying the employees of the PCC.

(C) Summary Judgment Was Properly Granted

Appellant also asserts that summary judgment was not appropriate here because the Government did not file an affidavit proving that the amount appellant owed in taxes was calculated correctly. Appellant cites Fed. R. Civ. P. 56(c) in support of her assertion that the Government should have filed an affidavit to show that there is no genuine issue of material

fact. Appellant neglects to mention Fed. R. Civ. P. 56(e) which provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading[s], but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

It is the adverse party to a motion for summary judgment who bears the burden of providing affidavits which set forth specific facts showing that there is a genuine issue for trial. Here, appellant made only a blanket denial in response to the Government's claim for the amount of taxes owed. It was the appellant who did not meet her burden in proving there was a genuine issue of

material fact. Summary judgment accordingly was properly granted.

III.

To summarize:

We hold that the district court properly held that the PCC is an agency under the test of control, and that it is the PCC, acting in its role as an agency of the Government, which paid the salary of its employees. The income earned as an employee of the agency is not exempt under §911. There being no genuine issue of material fact, summary judgment was appropriate.

Affirmed.

BY THE PRESIDENT OF THE UNITED STATES
OF AMERICA
A PROCLAMATION

CONSIDERING THAT:

The Panama Canal Treaty was signed at Washington on September 7, 1977, the text of which is hereto annexed;

The Senate of the United States of America by its resolution of April 18, 1978, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty, subject to the following:

(a) RESERVATIONS:

(1) Pursuant to its adherence to the principle of non-intervention, any action taken by the United States of America in the exercise of its rights to assure that the Panama Canal shall remain

open, neutral, secure, and accessible, pursuant to the provisions of the Panama Canal Treaty, the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, and the resolutions of ratification thereto, shall be only for the purpose of assuring that the Canal shall remain open, neutral, secure, and accessible, and shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity.

(2) The instruments of ratification of the Panama Canal

Treaty to be exchanged by the United States of America and the Republic of Panama shall each include provisions whereby each Party agrees to waive its rights and release the other Party from its obligations under paragraph 2 of Article XII of the Treaty.

(3) Notwithstanding any provision of the Treaty, no funds may be drawn from the Treasury of the United States of America for payments under paragraph 4 of Article XIII without statutory authorization.

(4) Any accumulated unpaid balance under paragraph 4(c) of Article XIII of the Treaty at the date of termination of the treaty

shall be payable only to the extent of any operating surplus in the last year of the duration of the Treaty, and nothing in such paragraph may be construed as obligating the United States of America to pay, after the date of the termination of the Treaty, any such unpaid balance which shall have accrued before such date.

(5) Exchange of the instruments of ratification of the Panama Canal Treaty and of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal shall not be effective earlier than March 31, 1979, and such Treaties shall not enter into force prior to October 1, 1979,

unless legislation necessary to implement the provisions of the Panama Canal Treaty shall have been enacted by the Congress of the United States of America before March 31, 1979.

(6) After the date of entry into force of the Treaty, the Panama Canal Commission shall, unless otherwise provided by legislation enacted by the Congress of the United States of America, be obligated to reimburse the Treasury of the United States of America, as nearly as possible, for the interest cost of the funds or other assets directly invested in the Commission by the Government of the United States of America and for

the interest cost of the funds or other assets directly invested in the predecessor Panama Canal Company by the Government of the United States of America and not reimbursed before the date of entry into force of the Treaty. Such reimbursement for such interest costs shall be made at a rate determined by the Secretary of the Treasury of the United States of America and at annual intervals to the extent earned, and if not earned, shall be made from subsequent earnings. For purposes of this reservation, the phrase "funds or other assets directly invested" shall have the same meaning as the phrase "net direct

investment" has under section 62 of title 2 of the Canal Zone Code.

(b) UNDERSTANDINGS:

(1) Before the first day of the three-year period beginning on the date of entry into force of the Treaty and before each three-year period following thereafter, the two Parties shall agree upon the specific levels and quality of services, as are referred to in paragraph 5 of Article III of the Treaty, to be provided during the following three-year period and, except for the first three-year period, on the reimbursement to be made for the costs of such services, such services to be limited to such as are essential to

the effective functioning of the Canal operating areas and the housing areas referred to in paragraph 5 of Article III. If payments made under paragraph 5 of Article II for the preceding three-year period, including the initial three-year period, exceed or are less than the actual costs to the Republic of Panama for supplying, during such period, the specific levels and quality of services agreed upon, then the Panama Canal Commission shall deduct from or add to the payment required to be made to the Republic of Panama for each of the following three years one-third of such excess or deficit, as the case may be. There shall be an

independent and binding audit, conducted by an auditor mutually selected by both Parties, of any costs of services disputed by the two Parties pursuant to the reexamination of such costs provided for in this understanding.

(2) Nothing in paragraph 3, 4, or 5 of Article IV of the Treaty may be construed to limit either the provisions of the first paragraph of Article IV providing that each Party shall act, in accordance with its constitutional processes, to meet danger threatening the security of the Panama Canal, or the provisions of paragraph 2 of Article IV providing that the United States of America

shall have primary responsibility to protect and defend the Canal for the duration of the Treaty.

(3) Nothing in paragraph 4(c) of Article XIII of the Treaty shall be construed to limit the authority of the United States of America, through the United States Government agency called the Panama Canal Commission, to make such financial decisions and incur such expenses as are reasonable and necessary for the management, operation, and maintenance of the Panama Canal. In addition, toll rates established pursuant to paragraph 2(d) of Article III need not be set at levels designed to produce revenues to cover the

payment to the Republic of Panama described in paragraph 4(c) of Article XIII.

(4) Any agreement concluded pursuant to paragraph 11 of Article IX of the treaty with respect to the transfer of prisoners shall be concluded in accordance with the constitutional processes of both Parties.

(6) The President shall include all reservations and understandings incorporated by the Senate in this resolution of ratification in the instrument of ratification to be exchanged with the Government of the Republic of Panama.

The Treaty was ratified by the

President of the United States of America on June 15, 1978, subject to the said reservations and understandings, in pursuance of the advice and consent of the senate and was ratified on the part of the Republic of Panama on June ____, 1978;

It is provided in Article II of the Treaty that the Treaty shall enter into force simultaneously with the Treaty Concerning Permanent Neutrality and Operation of the Panama Canal, six calendar months from the date of the exchange of the instruments of ratification.

The instruments of ratification of the Treaty were delivered to Panama on June 16, 1978, with the exchange of the instruments of ratification effective on

April 1, 1979, and accordingly the Treaty subject to the said reservations and understandings, enters into force on October 1, 1979;

NOW, THEREFORE, I, Jimmy Carter, President of the United States of America, proclaim and make public the Treaty, subject to the said reservations and understandings, to the end that it shall be observed and fulfilled with good faith on and after October 1, 1979, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-fourth day of September in the year of our Lord one thousand nine hundred seventy-nine and of the Independence of the United States of America the two hundred fourth.

By the President:

Warren Christopher
Acting Secretary of State

Jimmy Carter

**PANAMA CANAL TREATY**

The United States of America and the Republic of Panama,

Acting in the spirit of the Joint Declaration of April 3, 1964,[1] by the Representatives of the Governments of the United States of America and the Republic of Panama, and of the Joint Statement of Principles of February 7, 1974,[2] initialed by the Secretary of State of the United States of America and the Foreign Minister of the Republic of Panama, and

Acknowledging the Republic of Panama's sovereignty over its territory,

Have decided to terminate the prior

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[1]Department of State Bulletin, Apr.27, 1964, p.656

[2]Department of State Bulletin, Feb. 27, 1974, p.184.

Treaties pertaining to the Panama Canal and to conclude a new Treaty to serve as the basis for a new relationship between them and, accordingly, have agreed upon the following:

ARTICLE I

Abrogation of Prior Treaties and Establishment of a New Relationship

1. Upon its entry into force, this Treaty terminates and supersedes:

(a) The Isthmian Canal Convention between the United States of America and the Republic of Panama, signed at Washington, November 18, 1903;[3]

(b) The Treaty of Friendship and Cooperation signed at Washington,

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[3]TS 431; 33 Stat. 2234; 10 Bevans 663.

March 2, 1936,[1] and the Treaty of Mutual Understanding and Cooperation and the related Memorandum of Understandings Reached, signed at Panama, January 25, 1955,[2] between the United States of America and the Republic of Panama;

(c) All other treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama, concerning the Panama Canal which were in force prior to the entry into force of this Treaty;[3] and

(d) Provisions concerning the Panama Canal which appear in other

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[1]TS 945; 55 Stat. 1807; 10 Bevans 742.

[2]TIAS 3297; 6 UST 3297.

[3]See agreed minute, para. 1.

treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama which were in force prior to the entry into force of this Treaty.

2. In accordance with the terms of this Treaty and related agreements, the Republic of Panama, as territorial sovereign, grants to the United States of America, for the duration of this Treaty, the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal. The Republic of Panama guarantees to the United States of America the peaceful use of the land and water areas which it has been granted the rights to use for such purposes pursuant to this Treaty

and related agreements.

3. The Republic of Panama shall participate increasingly in the management and protection and defense of the Canal, as provided in this Treaty.

4. In view of the special relationship established by this Treaty, the United States of America and the Republic of Panama shall cooperate to assure the uninterrupted and efficient operation of the Panama Canal.

ARTICLE II

Ratification, Entry into Force, and Termination

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as

the instruments of ratification of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal,[1] signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, six calendar months from the date of the exchange of the instruments of ratification.[2]

2. This Treaty shall terminate at noon, Panama time, December 31, 1999.

ARTICLE III

Canal Operation and Management

1. The Republic of Panama, as territorial sovereign, grants to the

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[1] omitted

[2] Oct. 1, 1979.

United States of America the rights to manage, operate, and maintain the Panama Canal, its complementary works, installations and equipment and to provide for the orderly transit of vessels through the Panama Canal. The United States of America accepts the grant of such rights and undertakes to exercise them in accordance with this Treaty and related agreements.

2. In carrying out the foregoing responsibilities, the United States of America may:

(a) Use for the aforementioned purposes, without cost except as provided in this Treaty, the various installations and areas (including the Panama Canal) and waters, described in the Agreement in

Implementation of this Article,[1] signed this date, as well as such other areas and installations as are made available to the United States of America under this treaty and related agreements, and take the measures necessary to ensure sanitation of such areas;

(b) Make such improvements and alterations to the aforesaid installations and areas as it deems appropriate, consistent with the terms of this Treaty;

(c) Make and enforce all rules pertaining to the passage of vessels through the Canal and other rules with respect to navigation and maritime matters, in accordance with

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[1]TIAS 10031; post. p.141.

this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules;

(d) Establish, modify, collect and retain tolls for the use of the Panama Canal, and other charges, and establish and modify methods of their assessment;

(e) Regulate relations with employees of the United States Government;

(f) Provide supporting services to facilitate the performance of its responsibilities under this Article;

(g) Issue and enforce regulations for the effective exercise of the rights and responsibilities of

the United States of America under this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules; and

(h) Exercise any other right granted under this Treaty, or otherwise agreed upon between the two Parties.

3. Pursuant to the foregoing grant of rights, the United States of America shall, in accordance with the terms of this Treaty and the provisions of United States law, carry out its responsibilities by means of a United States Government agency called the Panama Canal Commission, which shall be constituted by and in conformity with the laws of the United States of America.

(a) The Panama Canal Commission shall be supervised by a Board composed of nine members, five of whom shall be nationals of the United States of America, and four of whom shall be Panamanian nationals proposed by the Republic of Panama for appointment to such positions by the United States of America in a timely manner.

(b) Should the Republic of Panama request the United States of America to remove a Panamanian national from membership on the Board, the United States of America shall agree to such a request. In that event, the Republic of Panama shall propose another Panamanian national for appointment by the United States of America to such position in a

timely manner. In case of removal of a Panamanian member of the board at the initiative of the United States of America, both Parties will consult in advance in order to reach agreement concerning such removal, and the Republic of Panama shall propose another Panamanian national for appointment by the United States of America in his stead.

(c) The United States of America shall employ a national of the United States of America as Administrator of the Panama Canal Commission, and a Panamanian national as Deputy Administrator, through December 31, 1989. Beginning January 1, 1990, a Panamanian national shall be employed as the Administrator and a national of the

United States of America shall occupy the position of Deputy Administrator. Such Panamanian nationals shall be proposed to the United States of America by the Republic of Panama for appointment to such positions by the United States of America.

(d) Should the United States of America remove the Panamanian national from his position as Deputy Administrator, or Administrator, the Republic of Panama shall propose another Panamanian national for appointment to such position by the United States of America.

4. An illustrative description of the activities the Panama Canal Commission will perform in carrying out the responsibilities and rights of the

United States of America under this article is set forth at the Annex. Also set forth in the annex are procedures for the discontinuance or transfer of those activities performed prior to the entry into force of this Treaty by the Panama Canal Company or the Canal Zone Government which are not to be carried out by the Panama Canal Commission.

5. The Panama Canal Commission shall reimburse the Republic of Panama for the costs incurred by the Republic of Panama in providing the following public services in the Canal operating areas and in housing areas set forth in the Agreement in Implementation of the Article III of this Treaty and occupied by both United States and Panamanian citizen employees of the Panama Canal

Commission: police, fire protection, street maintenance, street lighting, street cleaning, traffic management and garbage collection. The Panama Canal Commission shall pay the Republic of Panama the sum of ten million United States dollars ($10,000,000) per annum for the foregoing services. It is agreed that every three years from the date that this Treaty enters into force, the costs involved in furnishing said services shall be reexamined to determine whether adjustment of the annual payment should be made because of inflation and other relevant factors affecting the cost of such services.

6. The Republic of Panama shall be responsible for providing, in all areas comprising the former Canal Zone,

services of a general jurisdictional nature such as customs and immigration, postal services, courts and licensing, in accordance with this Treaty and related agreements.

7. The United States of America and the Republic of Panama shall establish a Panama Canal Consultative Committee, composed of an equal number of high-level representatives of the United States of America and the Republic of Panama and which may appoint such subcommittees as it may deem appropriate. This Committee shall advise the United States of America and the Republic of Panama on matters of policy affecting the Canal's operation. In view of both Parties' special interest in the continuity and

efficiency of the Canal operation in the future, the Committee shall advise on matters such as general tolls policy, employment and training policies to increase the participation of Panamanian nationals in the operation of the Canal, and international policies on matters concerning the Canal. The Committee's recommendations shall be transmitted to the two Governments, which shall give such recommendations full consideration in the formulation of such policy decisions.

8. In addition to the participation of Panamanian nationals at high management levels of the Panama Canal Commission, as provided for in paragraph 3 of this Article, there shall be growing participation of Panamanian

nationals at all other levels and areas of employment in the aforesaid Commission, with the objective of preparing, in an orderly and efficient fashion, for the assumption by the Republic of Panama of full responsibility for the management, operation and maintenance of the Canal upon the termination of this Treaty.

9. The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed

this date.

10. Upon entry into force of this Treaty, the United States Government agencies known as the Panama Canal Company and the Canal Zone Government shall cease to operate within the territory of the Republic of Panama that formerly constituted the Canal Zone.

ARTICLE IV

Protection and Defense

1. The United States of America and the Republic of panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.

2. For the duration of this Treaty, the United States of America shall have primary responsibility to protect and defend the Canal. The rights of the United Sates of America to station, train, and move military forces within the Republic of Panama are described in the Agreement in Implementation of this Article, signed this date.[1] The use of areas and installations and the legal status of the armed forces of the United Sates of America in the Republic of Panama shall be governed by the aforesaid Agreement.

3. In order to facilitate the participation and cooperation of the armed forces of both Parties in the protection and defense of the Canal, the

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[1]TIAS 10032; post, p. 307.

United States of America and the Republic of Panama shall establish a Combined Board comprised of an equal number of senior military representatives of each Party. These representatives shall be charged by their respective governments with consulting and cooperating on all matters pertaining to the protection and defense of the Canal, and with planning for actions to be taken in concert for that purpose. Such combined protection and defense arrangements shall not inhibit the identity or lines of authority of the armed forces of the United States of America or the Republic of Panama. The Combined Board shall provide for coordination and cooperation concerning such matters as:

(a) The preparation of contingency plans for the protection and defense of the Canal based upon the cooperative efforts of the armed forces of both Parties;

(b) The planning and conduct of combined military exercises; and

(c) The conduct of United States and Panamanian miliary operations with respect to the protection and defense of the Canal.

4. The Combined Board shall, at five-year intervals throughout the duration of this Treaty, review the resources being made available by the two Parties for the protection and defense of the Canal. Also, the Combined Board shall make appropriate recommendations to the two Governments

respecting projected requirements, the efficient utilization of available resources of the two Parties, and other matters of mutual interest with respect to the protection and defense of the Canal.

5. To the extent possible consistent with its primary responsibility for the protection and defense of the Panama Canal, the United States of America will endeavor to maintain its armed forces in the Republic of Panama in normal times at a level not in excess of that of the armed forces of the United States of America in the territory of the former Canal Zone immediately prior to the entry into force of this Treaty.

ARTICLE V

Principle of Non-Intervention

Employees of the Panama Canal Commission, their dependents and designated contractors of the Panama Canal Commission, who are nationals of the United States of America, shall respect the laws of the Republic of Panama and shall abstain from any activity incompatible with the spirit of this Treaty. Accordingly, they shall abstain from any political activity in the Republic of Panama as well as from any intervention in the internal affairs of the Republic of Panama. The United States of America shall take all measures within its authority to ensure that the provisions of the Article are fulfilled.

ARTICLE VI

Protection of the Environment

1. The United States of America and the Republic of Panama commit themselves to implement this Treaty in a manner consistent with the protection of the natural environment of the Republic of Panama. To this end, they shall consult and cooperate with each other in all appropriate ways to ensure that they shall give due regard to the protection and conservation of the environment.

2. A Joint Commission on the Environment shall be established with equal representation from the United States of America and the Republic of Panama, which shall periodically review the implementation of this Treaty and shall recommend as appropriate to the two Governments ways to avoid or, should

this not be possible, to mitigate the adverse environmental impacts which might result from their respective actions pursuant to the Treaty.

3. The United States of America and the Republic of Panama shall furnish the Joint Commission on the environment complete information on any action taken in accordance with this Treaty which, in the judgment of both, might have a significant effect on the environment. Such information shall be made available to the Commission as far in advance of the contemplated action as possible to facilitate the study by the commission of any potential environmental problems and to allow for consideration of the recommendation of the commission before the contemplated action is carried out.

ARTICLE VII

Flags

1. The entire territory of the Republic of Panama, including the areas the use of which the Republic of Panama makes available to the United States of America pursuant to this Treaty and related agreements, shall be under the flag of the Republic of Panama, and consequently such flag always shall occupy the position of honor.

2. The flag of the United States of America may be displayed, together with the flag of the Republic of Panama, at the headquarters of the Panama Canal Commission, at the site of the combined Board, and as provided in the Agreement in Implementation of Article IV of this Treaty.

3. The flag of the United States of America also may be displayed at other places and on some occasions, as agreed by both Parties.

ARTICLE VIII

Privileges and Immunities

1. The installations owned or used by the agencies or instrumentalities of the United States of America operating in the Republic of Panama pursuant to this Treaty and related agreements, and their official archives and documents, shall be inviolable. The two Parties shall agree on procedures to be followed in the conduct of any criminal investigation at such locations by the Republic of Panama.

2. Agencies and instrumentalities

of the Government of the United States of America operating in the Republic of Panama pursuant to this Treaty and related agreements shall be immune from the jurisdiction of the Republic of Panama.

3. In addition to such other privileges and immunities as are afforded to employees of the United States Government and their dependents pursuant to this Treaty, the United States of America may designate up to twenty officials of the Panama Canal Commission who, along with their dependents, shall enjoy the privileges and immunities accorded to diplomatic agents and their dependents under international law and practice. The United States of America shall furnish

to the Republic of Panama a list of the names of said officials and their dependents, identifying the positions they occupy in the Government of the United States of America, and shall keep such list current at all times.

ARTICLE IX

Applicable Laws and Law Enforcement

1. In accordance with the provisions of this Treaty and related agreements, the law of the Republic of Panama shall apply in the areas made available for the use of the United States of America pursuant to this Treaty. The law of the Republic of Panama shall be applied to matters or events which occurred in the former Canal Zone prior to the entry into force of this Treaty only to the extent

specifically provided in prior treaties and agreements.

2. Natural or juridical persons who, on the date of entry into force of this Treaty, are engaged in business or non-profit activities at locations in the former Canal Zone may continue such business or activities at those locations under the same terms and conditions prevailing prior to the entry into force of this Treaty for a thirty-month transition period from its entry into force. The Republic of Panama shall maintain the same operating conditions as those applicable to the aforementioned enterprises prior to the entry into force of this Treaty in order that they may receive licenses to do business in the Republic of Panama

subject to their compliance with the requirements of its law. Thereafter, such persons shall receive the same treatment under the law of the Republic of Panama as similar enterprises already established in the rest of the territory of the Republic of Panama without discrimination.

3. The rights of ownership, as recognized by the United States of America, enjoyed by natural or juridical private persons in buildings and other improvements to real property located in the former Canal Zone shall be recognized by the Republic of Panama in conformity with its laws.

4. With respect to buildings and other improvements to real property located in the Canal operating areas,

housing areas or other areas subject to the licensing procedure established in Article IV of the Agreement in Implementation of Article III of this Treaty, the owners shall be authorized to continue using the land upon which their property is located in accordance with the procedures established in that Article.

5. With respect to buildings and other improvements to real property located in areas of the former Canal Zone to which the aforesaid licensing procedure is not applicable, or may cease to be applicable during the lifetime or upon termination of this Treaty, the owners may continue to use the land upon which their property is located, subject to the payment of a

reasonable charge to the Republic of Panama. Should the Republic of Panama decide to sell such land, the owners of the buildings or other improvements located there shall be offered a first option to purchase such land at a reasonable cost. In the case of non-profit enterprises, such as churches and fraternal organizations the cost of purchase will be nominal in accordance with the prevailing practice in the rest of the territory of the Republic of Panama.

6. If any of the aforementioned persons are required by the Republic of Panama to discontinue their activities or vacate their property for public purposes, they shall be compensated at fair market value by the Republic of

Panama.

7. The provisions of paragraphs 2-6 above shall apply to natural or juridical persons who have been engaged in business or non-profit activities at locations in the former Canal Zone for at least six months prior to the date of signature of this Treaty.

8. The Republic of Panama shall not issue, act or enforce any law, decree, regulation, or internal agreement or take any other action which purports to regulate or would otherwise interfere with the exercise on the part of the united States of America of any right granted under this Treaty or related agreements.

9. Vessels transiting the Canal, and cargo, passengers and crews carried

on such vessels shall be exempt from any taxes, fees, or other charges by the Republic of Panama. However, in the event such vessels call at a Panamanian port, they may be assessed charges incident thereto, such as charges for services provided to the vessel. The Republic of panama may also require the passengers and crew disembarking from such vessels to pay such taxes, fees and charges shall be assessed on a nondiscriminatory basis.

10. The United States of America and the Republic of Panama will cooperate in taking such steps as may from time to time be necessary to guarantee the security of the Panama Canal Commission, its property, its employees and their dependents, and

their property, the Forces of the United States of America and the members thereof, the civilian component of the United States Forces, the dependents of members of the Forces and the civilian component, and their property, and the contractors of the Panama Canal Commission and of the United States Forces, their dependents, and their property. The Republic of Panama will seek from its Legislative Branch such legislation as may be needed to carry out the foregoing purposes and to punish any offenders.

11. The Parties shall conclude an agreement whereby nationals of either State, who are sentenced by the course of the other State, and who are not domiciled therein, may elect to serve

their sentences in their State of nationality.[1]

ARTICLE X

Employment with the Panama Canal Commission

1. In exercising its rights and fulfilling its responsibilities as the employer, the United States of America shall establish employment and labor regulations which shall contain the terms, conditions and prerequisites for all categories of employees of the Panama Canal Commission. These regulations shall be provided to the Republic of Panama prior to their entry into force.

2. (a) The regulations shall establish a system of preference when

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[1]TIAS 9787; UST p.1565.

hiring employees, for Panamanian applicants possessing the skills and qualifications required for employment by the Panama Canal Commission. The United States of America shall endeavor to ensure that the number of Panamanian nationals employed by the Panama Canal Commission in relation to the total number of its employees will conform to the proportion established for foreign enterprises under the law of the Republic of Panama.

(b) The terms and conditions of employment to be established will in general be no less favorable to persons already employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty, than those in effect immediately prior

to that date.

3. (a) The United States of America shall establish an employment policy for the Panama Canal Commission that shall generally limit the recruitment of personnel outside the Republic of Panama to persons possessing requisite skills and qualifications which are not available in the Republic of Panama.

(b) The United States of America will establish training programs for Panamanian employees and apprentices in order to increase the number of Panamanian nationals qualified to assume positions with the Panama Canal Commission, as positions become available.

(c) Within five years from

the entry into force of this Treaty, the number of United States nationals employed by the Panama Canal Commission who were previously employed by the Panama Canal Commission who were previously employed by the Panama Canal Company shall be at least twenty percent less than the total number of United States nationals working for the Panama Canal Company immediately prior to the entry into force of this Treaty.

(d) The United States of America shall periodically inform the Republic of Panama, through the Coordinating Committee, established pursuant to the Agreement in Implementation of Article III of this Treaty, of available positions within the Panama Canal Commission. The

Republic of Panama shall similarly provide the United States of America any information it may have as to the availability of Panamanian nationals claiming to have skills and qualifications that might be required by the Panama Canal Commission, in order that the United States of America may take this information into account.

4. The United States of America will establish qualification standards for skills, training and experience required by the Panama Canal Commission. In establishing such standards, to the extent they include a requirement for a professional license, the United States of America, without prejudice to its right to require additional professional skills and qualifications, shall

recognize the professional licenses issued by the Republic of Panama.

5. The United States of America shall establish a policy for the periodic rotation, at a maximum of every five years, of United States citizen employees and other non-Panamanian employees, hired after the entry into force of this Treaty. It is recognized that certain exceptions to the said policy of rotation may be made for sound administrative reasons, such as in the case of employees holding positions requiring certain non-transferable or non-recruitable skills.

6. With regard to wages and fringe benefits, there shall be no discrimination on the basis on nationality sex, or race. Payments by

the Panama Canal Commission of additional remuneration, or the provision of other benefits, such as home leave benefits, to United States nationals employed prior to entry into force of this Treaty, or to persons of any nationality, including Panamanian nationals who are thereafter recruited outside of the Republic of Panama and who change their place of residence, shall not be considered to be discrimination for the purpose of the paragraph.

7. Persons employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty, who are displaced from their employment as a result of the discontinuance by the United States of

America of certain activities pursuant to this Treaty, will be placed by the United States of America, to the maximum extent feasible, in other appropriate jobs with United Sates Civil Service regulations. For such persons who are not United States nationals, placement efforts will be confined to United States Government activities located within the Republic of Panama. Likewise, persons previously employed in activities for which the Republic of Panama assumes responsibility as a result of this Treaty will be continued in their employment to the maximum extent feasible by the Republic of Panama. The Republic of Panama shall, to the maximum extent feasible, ensure that the terms and conditions of

employment applicable to personnel employed in the activities for which it assumes responsibility are no less favorable than those in effect immediately prior to the entry into force of this Treaty. Non-United States nationals employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty who are involuntarily separated from their positions because of the discontinuance of an activity by reason of this Treaty, who are not entitled to an immediate annuity under the United States Civil Service Retirement System, and for whom continued employment in the Republic of Panama by the Government of the United States of America is not practicable, will be provided special

job placement assistance by the Republic of Panama for employment in positions for which they may be qualified by experience and training.

8. The Parties agree to establish a system where the Panama Canal Commission may, if deemed mutually convenient or desirable by the two Parties, assign ceratin employees of the Panama Canal Commission, for a limited period of time, to assist in the operation of activities transferred to the responsibility of the Republic of Panama as a result of this Treaty or related agreements. The salaries and other costs of employment of any such persons assigned to provide such assistance shall be reimbursed to the United States of America by the Republic

of Panama.

9. (a) The right of employees to negotiate collective contracts with the Panama Canal Commission is recognized. Labor relations with employees of the Panama Canal Commission shall be conducted in accordance with forms of collective bargaining established by the United States of America after consultation with employee unions.

(b) Employee unions shall have the right to affiliate with international labor organizations.

10. The United States of America will provide an appropriate early optional retirement program for all persons employed by the Panama Canal Company or Canal Zone Government immediately prior to the entry into

force of this Treaty. In this regard, taking into account the unique circumstances created by the provisions of this Treaty, including its duration, and their effect upon such employees, the United States of America shall, with respect to them:

(a) determine that conditions exist which invoke applicable United States law permitting early retirement annuities and apply such law for a substantial period of the duration of the Treaty;

(b) seek special legislation to provide more liberal entitlement to, and calculation of, retirement annuities than is currently provided for by law.

ARTICLE XI

Provisions for the Transition Period

The Republic of Panama shall reassume plenary jurisdiction over the former Canal Zone upon entry into force of this Treaty and in accordance with its terms.

1. In order to provide for an orderly transition to the full application of the jurisdictional arrangements established by this Treaty and related agreements, the provisions of the Article shall become applicable upon the date this Treaty enters into force, and shall remain in effect for thirty calendar months. The authority granted in this Article to the United States of America for this transition period shall supplement, and is not intended to limit, the full application and effect of the rights and authority

granted to the united States of America elsewhere in this Treaty and in related agreements.

2. During this transition period, the criminal and civil laws of the United States of America shall apply concurrently with those of the Republic of Panama in certain of the areas and installations made available for the use of the United States of America pursuant to this Treaty, in accordance with the following provisions:

(a) The Republic of Panama permits the authorities of the United States of America to have the primary right to exercise criminal jurisdiction over United States citizen employees of the Panama Canal Commission and their dependents, and members of the United

Sates Forces and civilian components and their dependents, in the following cases:

(i) for any offense committed during the transition period within such areas and installations, and

(ii) for any offense committed prior to that period in the former Canal Zone.

The Republic of Panama shall have the primary right to exercise jurisdiction over all other offenses committed by such person, except as otherwise provided in this Treaty and related agreements or as may be otherwise agreed.

(b) Either Party may waive its primary right to exercise jurisdiction in a specific case or

category of cases.

3. The United States of America shall retain the right to exercise jurisdiction in criminal cases relating to offenses committed prior to the entry into force of this Treaty in violation of the laws applicable in the former Canal Zone.

4. For the transition period, the United States of America shall retain police authority and maintain a police force in the aforementioned areas and installations. In such areas, the police authorities of the United States of America may take into custody any person not subject to their primary jurisdiction if such person is believed to have committed or to be committing an offense against applicable laws or

regulations, and shall promptly transfer custody to the police authorities of the Republic of Panama. The United States of America and the Republic of Panama shall establish joint police patrols in agreed areas. Any arrests conducted by a joint patrol shall be the responsibility of the patrol member or members representing the Party having primary jurisdiction over the person or persons arrested.

5. The courts of the United States of America and related personnel, functioning in the former Canal Zone immediately prior to the entry into force of this Treaty, may continue to function during the transition period for the judicial enforcement of the jurisdiction to be exercised by the

United States of America in accordance with this Article.

6. In civil cases, the civilian courts of the United States of America in the Republic of Panama shall have no jurisdiction over new cases of a private civil nature, but shall retain full jurisdiction during the transition period to dispose of any civil cases, including admiralty cases, already instituted and pending before the courts prior to the entry into force of this Treaty.

7. The laws, regulations, and administrative authority of the United States of America applicable in the former Canal Zone immediately prior to the entry into force for the purpose of the exercise by the United States of

U.S.C. 3612(a)). The organizational structure of the PCC evidences that the United States government controls its operations.

The PCC was established to effectuate governmental purposes. It was created to carry out the responsibilities of the United States under the Panama Canal Treaty for operation of the canal (Pet. App. 24c; Treaty Art. III, ¶ 3). As this Court stated in *Rogers* v. *Graves*, 299 U.S. 401, 406 (1937): "That * * * the creation, management and operation of the [Panama] canal are all governmental functions * * * does not admit of doubt."

There is no private profit associated with the PCC's operation of the Panama Canal. Contrary to petitioner's argument (Pet. 20-21), payments made under the Treaty to the Republic of Panama do not qualify as private profit. The PCC collects tolls for the use of the canal (Pet. App. 23c; Treaty Art. III, ¶ 2(d)), the revenues are paid into a United States Treasury fund (22 U.S.C. 3712(c)), and the Republic of Panama is compensated for the Panamanian resources used in the operation of the canal (Pet. App. 77c-80c; Treaty Art. XIII, ¶ 4). The Treaty and federal legislation establishing the PCC provide for no payment of profit to any private entity or individual.

Persons employed by the PCC are not required to be United States government employees in order to be considered "government-connected persons" under *Morse* v. *United States*, 443 F.2d at 1186, and *Kalinski* v. *Commissioner*, 528 F.2d at 973-974. It is sufficient that the employees are subject to federal standards of conduct and discipline and that they are treated similarly to federal employees. *Ibid.* Under this standard, PCC employees are clearly government-connected persons. All PCC Board members, officers, and employees are required to "take an oath to discharge faithfully the duties of his office or employment" (22 U.S.C. 3622(a)).

Every employee is "subject to the laws of the United States regarding duties and responsibilities of Federal employees" (*ibid.*). PCC employees are required to adhere to a code of conduct "substantially equivalent" to that applicable to federal employees. 22 U.S.C. 3622(b). Individual employee grievances concerning job classification and pay rates are reviewed by the Panama Canal Board of Appeals (established pursuant to 22 U.S.C. 3661), and disputes arising between the PCC and its employee unions are handled by the Federal Labor Relations Authority (established pursuant to 5 U.S.C. 7701(b) to regulate rights and obligations of federal government employees).

Because the PCC is a United States agency for purposes of Section 911 of the Internal Revenue Code, the wages received by petitioner's husband from the PCC are subject to federal tax. There is no conflict of decisions or other reason warranting further review.[4]

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[4] Petitioner seeks to raise two additional issues (Pet. i-ii, 26-51): (i) whether the determination that the Panama Canal Commission is a United States agency violates Articles II and IV of the United States Constitution, and (ii) whether the Panama Canal Treaty violates Article II of the United States Constitution. Petitioner did not raise those issues below and the lower courts did not pass on them. Those issues are therefore not properly before the Court. See *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). Accord, *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992); *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 266 (1987).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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